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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a professional union organizer who expressly seeks employment in order to organize an employer's workforce is a *bona fide* "employee applicant" or "employee" within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(3).

2. Whether a professional union organizer who seeks employment in order to organize an employer's workforce, even if held to be a bona fide "employee applicant," constitutes such a risk of disloyalty that the employer may reject the union agent's job application on that ground without violating Sections 8(a)(1) and 8(a)(3) of the Act.

3. Whether the policies underlying the Act, which recognize and codify an adversarial relationship between unions and employers, support a requirement that employers be forced to hire union employee/agents whose announced objective is to gain access to the employer's workplace in order to serve the organizational interests of the employer's adversary, the union.

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NATIONAL LABOR RELATIONS BOARD

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals for the District of Columbia Circuit, rendered in these proceedings on July 21, 1992.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 968 F.2d 1327 (D.C. Cir. 1992) and is reproduced in the Petitioner's Appendix ("Pet. App.") at A1-A8. The pertinent opinions and orders of the National Labor Relations Board and the Administrative Law Judge are reported at 303 NLRB No. 33 (May 31, 1991) and are reproduced at Pet. App. A9-A47.

## JURISDICTION

The National Labor Relations Board exercised jurisdiction over the Petitioner in accordance with Section 10 of the National

Labor Relations Act, 29 U.S.C. §160, as the Petitioner is an employer affecting commerce. Jurisdiction in the Court of Appeals was premised on Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160 (f). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. §152:

"When used in this subchapter —

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ."

29 U.S.C. §157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. §158:

"(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership of any labor organization . . . ."

## STATEMENT OF THE CASE

### A. Facts

Willmar Electric Service, Inc. ("Willmar") is a multi-state electrical contractor headquartered in Willmar, Minnesota. In the early summer of 1988,[1] Willmar received a contract to perform electrical work on a J.C. Penny store under construction in Silverdale, Washington. J.A. 4.[2]

Upon learning that Willmar would be the electrical sub-contractor on the Penny project, Michael C. Hendrix, a full-time field organizer for Local Union No. 46 of the International Brotherhood of Electrical Workers (the "Union"), contacted Willmar officials about entering into an agreement with the Union for the project. J.A. 5. For the remainder of the year, Hendrix had frequent conversations with Willmar officials about this subject, despite the fact that he was told that Willmar was not interested in signing an agreement with the Union, but that it was interested in accepting applications from union members to staff the project. J.A. 56; 190.

In early September, Hendrix wrote a letter to an official at Willmar's headquarters, on Union stationary, requesting that it reconsider its position in signing a project agreement with the Union and that Willmar provide Hendrix with employment applications. The letter was signed by Hendrix in his capacity as "I.B.E.W. Local #46 Field Organizer." J.A. 217. Consistent with its prior position, the company informed Hendrix that it

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[1] All dates are in 1988, unless otherwise indicated.

[2] "J.A." refers to the parties' joint appendix in the court of appeals.

would accept employment applications from members of the Union and it sent an employment application to Hendrix on or about September 16. J.A. 195.

With the acquiescence of his superior and with the knowledge of four other Union organizers (J.A. 41), on October 14 Hendrix hand-delivered two completed employment applications to Willmar's project foreman, Douglas Rose. One application was that of a Union member, while the other was that of Hendrix himself. J.A. 15-16. On the employment history section of the application, Hendrix identified his present employer as "I.B.E.W. Local #46" and wrote to "work in the field" as the reason for his desire to work for Willmar. J.A. 218-219.

On November 25, Hendrix circulated a flyer stating that Willmar (and its general contractor) were paying substandard wages. The flyer was handed out at nine area J.C. Penny stores. J.A. 278; 42-43. Several days later, Hendrix delivered a letter to the general contractor's superintendent contending that employees on the Silverdale project were receiving substandard wages and benefits and that the Union intended to picket the job site. Attached to the letter was a copy of "Instructions to Pickets," which was printed on union stationary, and which directed that all questions be directed to "Mike Hendrix, I.B.E.W. Local #46" at the Union's address. The letter, written on Union stationary and signed by Hendrix as "I.B.E.W. Local Field Organizer" requested that the general contractor report violations of the picketing instructions directly "to the undersigned." J.A. 278A-C. A copy of the letter and attachment was hand-delivered by Hendrix to Willmar's foreman. J.A. 7-8; 46-47. The following day, Hendrix and others began picketing Willmar at the job site, carrying signs which stated: "Willmar Electric, Substandard Wages." The picketing continued until December 15.

On December 30, Hendrix again approached Rose about obtaining employment. Hendrix told Rose that he was looking

for a position with Willmar in order to organize its employees, but that he would limit his organizing activities to employees' lunch periods and after work hours. J.A. 52, 146. Rose responded that while he was hiring, he never seriously considered Hendrix for employment because he was working as a field organizer for the Union on a full-time basis and had openly expressed his intention to continue to pursue his organizing attempts if employed by Willmar. J.A. 145-147; 167. Thus, Rose told Hendrix that "its kind of hard to hire you when you're out there on the other side, picketing."[3] J.A. 19-20. Consequently, Willmar never hired Hendrix, although other applicants, who applied for employment after Hendrix, were offered positions with Willmar. Less than two weeks later, Hendrix filed the unfair labor practice charges which led to this appeal.

**B. Procedural History**

On January 11, 1989, the Union filed an unfair labor practice charge against Willmar alleging that Willmar refused to hire seven individuals because of their union activities. J.A. 204-216. The charge was filed by Hendrix in his capacity as "representative" of the Union. Also on January 11, 1989, Hendrix filed a similar unfair labor practice charge on his own behalf. In that charge, Hendrix alleged that Willmar refused to employ or otherwise consider him for employment because of his "union activities, affiliation and/or sympathies." J.A. 204-216.

On February 22, 1989, the National Labor Relations Board (the "Board") issued a Consolidated Complaint and Notice of Hearing based on Hendrix's charges. The Complaint alleged, *inter alia*, that Willmar's refusal to hire Hendrix violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3) (the "Act"). After an evidentiary

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[3] Several days later, Hendrix was observed distributing union literature to Willmar's employees in the parking lot. J.A. 60-61.

hearing before an Administrative Law Judge ("ALJ"), the ALJ issued a decision finding that, despite the fact that "Hendrix was a paid, fulltime union organizer intent on organizing [Willmar's] employees," Willmar violated Sections 8(a)(1) and (3) of the Act by its refusal to hire Hendrix. Pet. App. A37. The ALJ ordered Willmar to offer Hendrix full and immediate employment and to make him whole for any losses of earnings and benefits he may have suffered as a result of Willmar's refusal to hire him.

On October 3, 1989, Willmar sought review of the ALJ's decision by the Board. In its exceptions to the ALJ's decision, Willmar asserted that as Hendrix was a full-time, paid union organizer at the time he applied for employment, it could lawfully refuse to hire him. Relying on its decision in *H.B. Zachry Co.*, 289 NLRB 838 (1988), *enf. den.*, 886 F.2d 70 (4th Cir. 1989), the Board affirmed the ALJ's decision on the basis that full-time paid union organizers are "employees" within the meaning of the Act who cannot be denied employment based on their union activity or status. Pet. App. A12. Acknowledging that its holding in *Zachry* had been reversed by the Fourth Circuit, the Board ruled as an alternative basis for affirmance that the absence of certain facts in the record rendered the instant case distinguishable from *Zachry*. Consequently, in its Decision and Order issued on May 31, 1991, the Board affirmed the ALJ's decision in its entirety. Pet. App. A13.

On July 1, 1991, Willmar filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, requesting that the Court set aside the Board's Decision and Order. In its petition for review, Willmar asserted that the Board's order in this case should be set aside because the Board had erroneously interpreted the statutory term "employee" as defined in the Act. Moreover, Willmar contended that the Board's alternative claim that the *Zachry* case was "factually distinguishable" was contrary to the record and not supported

by substantial evidence. Willmar further argued that the policies underlying Section 8(a)(3) of the Act did not support a requirement that an employer be forced to hire an employee-agent of a labor union.

However, on July 21, 1992, the Court of Appeals denied Willmar's petition for review and granted the Board's cross-application for enforcement of its order. Pet. App. A8. Purporting to apply common law principles of agency, the Court declared that a person could have two employers at one time, apparently even where the interests of the two employers directly conflict. *Id.* at A6. The Court of Appeals implicitly rejected Willmar's claim, and the holding of the Fourth Circuit in *H.B. Zachry, Inc. v. NLRB*, that the adverse relationship between unions and employers precluded such dual employment under the Act. The Court went on to concede that Willmar had presented a "powerful case" of likely disloyalty by Hendrix, but the Court nevertheless ruled against Willmar on the ground that such disloyalty did not disqualify Hendrix from the protection of Section 8(a)(3) absent proof that Willmar would have refused to hire the organizer absent his union activities. Id. at A7. The Court inexplicably left "to another day" the issue squarely before it, *i.e.*, the issue of "when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground." *Id.* at A8.

## REASONS FOR GRANTING THE WRIT

### I. THE D.C. CIRCUIT'S CONCLUSION THAT A PROFESSIONAL UNION ORGANIZER IS AN EMPLOYEE UNDER SECTION 2(3) OF THE ACT IS IN SHARP CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH HOLDINGS OF THIS COURT.

As detailed below, other Circuit Courts of Appeals, including the Fourth and Sixth Circuits, have on similar facts reached a conclusion opposite to the D.C. Circuit's holding in this case. *H.B. Zachry, Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). These other courts have determined that where a professional union organizer applies for a job with the primary intent of organizing the employer's workforce, he is not a bona fide employee or employee applicant under the Act and is, therefore, not entitled to the protection of Sections 8(a)(1) and (3).[4] On the other hand, the Second and Third Circuits have taken positions, without explanation, that are consistent with the D.C. Circuit's holding. *See Escada, Inc. v. NLRB*, ____ F.2d ____, 140 LRRM (BNA) 2872 (3d Cir. 1992); *NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2d Cir. 1979). Thus, the federal courts simply do not agree on what is meant by the term "employee" under the Act in this context. The significant uncertainty which now pervades this area of the law underscores the need for this Court's guidance.

In *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), a professional union organizer for the International Brotherhood of Boilermakers, one Barry Edwards, applied for employment

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[4] While the protections accorded under the Act extend only to "employees," 29 U.S.C. §§152(3) and 158, bona fide applicants for employment may be considered to be employees entitled to the same privileges against discrimination. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

with a non-union contractor for the avowed purpose of organizing the contractor's work force. As in the present case, during the entire time Edwards sought employment with the contractor, he was employed by the union as a business representative.

The Board ruled that the contractor's refusal to hire Edwards due to his professed affiliation with the Boilermakers as a union organizer violated Sections 8(a)(1) and (3) of the Act. *H.B. Zachry Co.*, 289 NLRB 838 (1988). According to the Board, the union organizer was a bona fide applicant, and therefore an "employee" subject to the Act's protections, regardless of his apparently divided loyalties and his admission that he sought employment with the contractor for the sole purpose of organizing its employees.

On appeal, the Fourth Circuit reversed the Board. The court ruled that Edwards, a union organizer, was not a bona fide applicant for employment, and therefore, was not covered under the Act. According to the court, the Board's contention that the definition of "employee" included an individual concurrently employed and paid by a union to organize employees of the contractor was one that "exalts form over substance." *H.B. Zachry Co. v. NLRB*, *supra*, 886 F.2d at 73. The court ruled that the union organizer could not realistically be found to be a bona fide applicant because "at core he would remain an employee of the union." *Id.* at 73. In this regard the court stated:

> So too, it would be disingenuous to say that Edwards was a job applicant in the ordinary sense of the word. Edwards was not in search of a job; he already had and would continue to have that. Edwards was looking for entry to the Zachry plant in order to fulfill his duties as an organizer.
>
> * * *
>
> It is hardly unreasonable, of course, for a company to assume that a paid organizer would prefer to stay on the job only temporarily, i.e., the length of the or-

> ganizational campaign, and not until a project was complete. It is not, however, merely the temporary nature of a full-time union organizer's interest in employment which distinguishes him or her from a bona fide applicant, but the entire character of the future employment relationship. Edwards' interest in applying to Zachry for employment was qualitatively different from that of a bona fide applicant.

*Id.* at 73-74.

Likewise, the U.S. Court of Appeals for the Sixth Circuit refused to enforce a Board decision which held that an employer unlawfully discharged an individual who was employed as an organizer by a labor organization. In *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964), the Board ruled that Elias violated Sections 8(a)(1) and (3) of the Act by discharging a waitress who was actively involved in organizing Elias' employees on behalf of the Hotel and Restaurant Employees Union. The union did not pay the waitress a salary, but merely provided her with $15 per week for reimbursement for telephone calls to employees during the organizing efforts as well as for gasoline used in her car in driving employees home from work to discuss the union.

On appeal, the Sixth Circuit reversed the Board, ruling that, because the waitress was employed by the union prior to obtaining employment with Elias, and in light of the union's reimbursement of the waitress's organizing expenses, the waitress "was not a bona fide employee within the intent of § 2(3) of the Act." *Id.* at 427.

For the purposes of analyzing whether a professional union organizer is an employee entitled to the protections of the Act, the above cases are factually indistinguishable from this case. In each case, the employee was employed (or sought employment) simultaneously by a company and by a union. In each case, the employee sought access to the job site for the avowed

purpose, not of furthering the employer's business, but in order to organize its workforce in his or her capacity as an employee agent of the union. Despite this identity of facts and legal issues, the courts in *H.B. Zachry* and *Elias Bros.*, reached results which are diametrically opposed to and irreconcilable with the decision in this case.[5]

The D.C. Circuit's rejection of the Fourth Circuit's reading of the Act rests on a faulty application of this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992), and a misinterpretation of the common law definition of the word "employee." According to the Court of Appeals, under the common law of agency "'[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment to the other.'" Pet. App. A6. The Court of Appeals interpreted this principle as allowing a union employee/agent to claim dual employment status with the union's adversary, a targeted business. Both the *Darden* decision, however, and the common law, compel the opposite result from that achieved by the Court of Appeals.

In *Darden*, this Court held that the "statutory use of the word 'employee' should be taken to have its common law meaning unless Congress 'clearly indicates otherwise'." 112 S. Ct. at 1349. The Court issued this holding in the context of restraining the courts of appeals from expanding the reach of federal labor laws beyond the plain meaning of their terms. Thus, when the Fourth Circuit in *Darden* attempted to apply the

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[5] Although the Board attempted to distinguish the facts of the present case from those in *H. B. Zachry*, *see* Pet. App. A12, the D.C. Circuit did not base its holding on any such distinction and implicitly rejected it. *See* Pet. App. at A6. In any event, the distinctions raised by the Board, pertaining to the supposed lack of evidence of Hendrix's future employment by the Union, were contrary to the record, which showed that Hendrix fully intended to work for the Union while employed by Willmar and certainly gave that impression to the employer. J.A. 39-39A, 52, 146.

term "employee" under ERISA to individuals who it acknowledged had no common law employment relationship, this Court reversed the court of appeals for misreading the Act. The Court expressly criticized as a "feeble precedent" its own prior expansive reading of the NLRA's definition of "employee" in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-129 (1944).[6]

In the present case, the Court of Appeals has twisted the *Darden* opinion into a prescription for *expanding* the NLRA's definition of "employee" beyond the common sense intent of Congress, exactly what this Court sought to prevent in *Darden*. The result achieved by the Court of Appeals undermines the careful balance struck by Congress between the adversarial forces of unions and management.

Contrary to the Court of Appeals, the common law does not recognize as a bona fide employee one who seeks to serve two masters who are adversaries with each other. In such a circumstance, the performance of service to one adversary clearly constitutes abandonment of service to the other. Even that portion of the Restatement (Second) of Agency cited by the D.C. Circuit, Pet. App. at A6, expressly recognizes this principle, allowing dual employment if and *only* if "the service to one does not involve abandonment of service to the other." Restatement (Second) of Agency at 226 (1958).[7]

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[6] As further stated by the framers of the Taft-Hartley Act of 1947, in seeking to correct earlier unwarranted Board expansions of the term "employee":

> It is inconceivable that Congress, when it passed the Act, authorized the Board to give every word in the Act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give words not far-fetched meaning but ordinary meanings.

H.R. Rep. No. 245 80th Cong., 1st Sess., at 19 (1947) reprinted in NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 309.

[7] The Restatement further holds: "Since. . . the relation of master and servant is dependent upon the right of the master to control the conduct of

In the context of federal labor law, these principles clearly preclude individuals from being "employed" by both a union and by the company which the union is seeking to organize. As this Court has held, the NLRA recognizes and codifies the fact that unions and management are "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting). The Act codifies this adversary relationship in numerous ways. These include Section 8(a)(2), 29 U.S.C. § 158 which prohibits employer domination or assistance to unions, and Section 302, which prohibits payments by employers to union officials. 29 U.S.C. § 186.[8]

It ignores the realities of the workplace to assert that dual employment by labor and management is possible in an organizing context. Based upon Congress' expressed intent and the common law definition of employment, no such duality can exist as a matter of law.[9] The Court of Appeals' failure to acknowledge the adversary relationship between unions and employers is directly contrary to the common law and conflicts with decisions of this Court and the intent of Congress.

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the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them." Id. at § 226.

[8] *See, e.g., Farmers Energy Corp. v. NLRB*, 730 F.2d 1098 (7th Cir. 1984) (enforcing 8(a)(2)); *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (enforcing Section 302). *See also H.B. Zachry Co. v. NLRB*, 886 F.2d at 75.

[9] "[An individual] cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other ....". Restatement (Second) of Agency Section 226, (1958). It is this pre-existing agency relationship that distinguishes the professional union organizer from a bona fide employee who is merely sympathetic to the union. *See H. B. Zachry Co. v. NLRB*, 886 F.2d at 76.

The Court of Appeals' decision also obliterates the distinction between employees and non-employee union agents only recently reaffirmed by this Court in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). There, the Court held that "[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Accordingly, the Court in *Lechmere* reversed a Board policy which granted workplace access to union organizers as if they were entitled to the same rights as employees under the Act. *See also NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

While the D.C. Circuit claimed to see "no conflict" on this score, Pet. App. at A7, its holding plainly allows non-employee union agents to achieve under the guise of "employment" applications what the Court in *Lechmere* said they were not entitled to, *i.e.*, forced entry into the workplace under the protection of the NLRA. Certainly, the Fourth Circuit recognized the conflict arising from permitting such a result, stating:

> The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. *Babcock*, 357 U.S. at 113-14, 76 S. Ct. at 684-85. To require Zachry to allow [a union organizer] to solicit and organize on its property because he was claiming entrance as a "job applicant" would render ineffective the protection offered employer's in the *Babcock* decision. *See also Central Hardware Co. v. NLRB*, 439 F.2d 1321, 132 (8th Cir. 1971) *rev'd on other grounds*, 407 U.S. 539, 92 S. Ct. 2238, 33 L.Ed.2d 122 (1972), *on remand*, 468 F.2d 252 (8th Cir. 1972) (company had right to bar union organizer from entering store because he was not a bona fide

customer as his primary purpose was to check employees, thus disrupting selling areas).

Finally, the decision of the D.C. Circuit is inconsistent with the Board's own policy of shielding the representation process and bargaining unit employees from monetary or other inducements from either unions or management. *See Owens-Illinois, Inc.*, 271 NLRB 1235 (1984) (representation election set aside due to union inducements to employees); *see also 299 Lincoln Street, Inc.*, 292 NLRB 72 (1988); *Multimatic Products, Inc.*, 288 NLRB 1279 (1988) (excluding union organizers from voting in representation elections).

The Court of Appeals has erroneously asserted that the "representation process" issue can be addressed at the time of an actual election. In fact, however, the expressed organizational purpose of the union agent in seeking employment demands that the unlawful inducement be addressed at the hiring stage. If the Board believes that monetary payments to employees may unlawfully interfere with the representation process, then it makes no sense for employers to be forced to hire employees who are known to be employed by the union for an organizational purpose.

In the present case, the evidence clearly established that at the time he applied for employment with Willmar, Hendrix was paid by and actively serving the interests of his union employer. He never informed Willmar of any intent on his part to leave the union's employ. Hendrix further stated that he would have retained his position with the union as a field organizer and that his sole purpose for seeking employment was to organize Willmar's workforce on behalf of his union employer. Under these facts, it defies common law (and common sense) and is contrary to the Act to order a company to treat such an individual as a bona fide employee applicant who must be given access to the employer's workplace. The present petition should be granted so that the conflict between the D.C. Circuit and the

Fourth and Sixth Circuits, as well as the conflict with this Court's decisions in *Darden* and *Lechmere*, can be resolved on this important issue.

## II. THE D.C. CIRCUIT'S HOLDING THAT AN EMPLOYER'S REFUSAL TO HIRE A PROFESSIONAL UNION ORGANIZER ON GROUNDS OF DISLOYALTY CAN NEVERTHELESS BE DEEMED TO HAVE VIOLATED SECTION 8(a)(3) OF THE ACT, ALSO CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

Regardless of whether a professional union organizer should somehow be deemed to fall within the definition of an "employee/employee applicant" under the Act, the Court of Appeals should nevertheless have found that a refusal to hire such a person on grounds of a good faith belief in his likely disloyalty does not violate Sections 8(a)(1) and (3) of the Act. The D.C. Circuit's failure to decide this issue properly creates a further conflict with decisions in other circuits and of this Court. *See NLRB v. Transportation Management Corp. NLRB*, 462 U.S. 393 (1983); *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 172 (1953); *Boeing Airplane Co. v. NLRB*, 238 F.2d 188 (9th Cir. 1956); *Raytheon Co.*, 279 NLRB 245 (1986); *Lucky Stores*, 269 NLRB 942 (1984).

In the present case, the Court of Appeals assumed (correctly) that "Willmar made out so powerful a case of likely disloyalty that the Board would have had to conclude that rejection of Hendrix's application on that ground would have been legitimate and not in violation of the anti-discrimination and anti-coercion provisions of the Act." Pet. App. at A7, *citing George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C.

another day" the issue of "when employment ties to a union establish such a risk of disloyalty that the (non-union) employer

can reject or dismiss the union employee on that ground." *Id.* at A8.

Contrary to the Court of Appeals, that issue is squarely presented by this case. The employer here plainly demonstrated its good faith belief that Hendrix's continued employment by the union was inconsistent with his duty of loyalty to his employer. Indeed, each of the facts previously discussed which led the employer to conclude that Hendrix was not a bona fide employee applicant, by definition, justified the employer in believing that Hendrix would be loyal only to the interest of its adversary, the union.

Under analogous circumstances, courts have held that discharge for disloyalty does not violate Section 8(a)(3). In *Boeing Airplane Co. v. NLRB*, 239 F.2d 188 (9th Cir. 1956), for example, it was held that an employee was properly discharged for encouraging employees to work for an employer's competitors. *See also Advertising Specialists*, 232 NLRB 50 (1977) (no violation of 8(a)(3) where employee discharged for competing with his employer); *Kenai Helicopters*, 235 NLRB 931, 936 (1978).

The *Boeing* case cited this Court's holding in *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 172 (1953). There, the Court upheld the discharge of certain employees who made publicly disparaging remarks about their employer. The Court quoted approvingly the following language from *Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951):

> An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same, engage in activities to injure or destroy his employer's business.

Similarly, in the present case, where an applicant's likely disloyalty arises from his concurrent employment as a professional union organizer, the policies underlying the Act compel a finding that a refusal to hire the applicant does not violate Section 8(a)(3). Because of the adversarial relationship between the union and the employer, the applicant's concurrent employment by the union, and not merely his union-related activities, constitute ample cause for disloyalty on his part, and an employer is clearly justified in believing in good faith that such disloyalty is likely to occur.

Nor should Willmar have been required to demonstrate that Hendrix had in fact engaged in a disloyal act. Because he had not yet been hired, such proof would be impossible to procure. Instead, the Board itself has held that an employer is not required to wait until an actual breach of loyalty occurs to take protective action, where an employee is in a conflict situation. "Indeed, conflicts of interest are by their nature anticipatory or potential; it is the competing interests that give rise to the conflict, and the conflict continues to exist, even if the individual in whom it exists never acts in derogation of either interest." *Raytheon Co.*, 279 NLRB 245, 249 n.11 (1986). *See also Lucky Stores*, 269 NLRB 942 (1984); *Emanuel Hospital*, 268 NLRB 1344 (1984).

Thus, the Board has consistently held that it is not a violation of the Act to take an unfavorable employment action against an employee in order to protect confidential information, where the employer has a good faith belief that the employer might disclose such information to a union. *Lucky Stores*, *supra*.

It is also wrong to suggest that no likelihood of disloyalty exists so long as the union agent promises to engage in organizing activity only on his own time. By giving access to the workplace, the employer would rightly be concerned about the transmittal of sensitive information by the union agent to the employer's adversary, the union, and other similar misconduct.

Under such facts, an employer should not be compelled to accept the application of someone it knows to have an adverse employment interest. Put simply, if an individual is employed by a union to organize, then he cannot claim to be serving the interests of the firm which is the target of that organizing effort. No violation of Section 8(a)(1) and (3) should be found where the employer acts upon its good faith belief in the likely disloyalty of a paid union agent and refuses to hire the agent for that reason.

## III. RESOLUTION OF THE CONFLICTS CREATED BY THE D.C. CIRCUIT'S DECISION IS OF NATIONAL IMPORTANCE BECAUSE THE EFFECT OF THE DECISION IS TO UNDERMINE THE POLICIES OF THE ACT.

As discussed above, the National Labor Relations Act places careful limits on the context in which employers and unions may pursue their competing interests. *See Carpenters' Union v. NLRB*, 357 U.S. 93, 99-100 (1958) (recognizing that the NLRA and its amendments strike a "balance . . . between the uncontrolled power of management and labor to further their respective interests"); *see also H.B. Zachry Co. v. NLRB*, 886 F.2d at 74 ("in effect, the Act defines the terms on which union and employer can compete in seeking to convince the employees of the respective pros and cons of unionization."). *See also NLRB v. Drivers Local Union*, 362 U.S. 274, 287-88 (1960) (quoting from the legislative history of section 8(b), 93 Cong. Rec. 4436).

The underlying purposes of the Act, which attempt to strike this balance between the legitimate and competing rights of unions and employers, will be undermined if the Board is allowed to compel employers to hire professional union representatives whose application for employment is merely a pretext to further the organizing interests of the union whom they represent.

As has further been shown, the D.C. Circuit's decision violates the Act by treating as indistinguishable the protected rights of employees, on the one hand, and the unprotected claims of nonemployee organizers, on the other. By elevating professional union organizers to the same protected status as bona fide employee organizers, the Court of Appeals has directly contravened the holding of this Court in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). Again, to allow professional union organizers nearly unlimited access to an employer's private property by means of the simple expedient of filling out an employment application "would be to upset the careful balance struck by Congress." *H.B. Zachry Co. v. NLRB*, 886 F.2d at 74.

Finally, absent reversal of the Board's policy and the decision of the D.C. Circuit, a very real danger exists to the representation process. Taking the license granted by the Board to its fullest extent, unions are presently enlisting large numbers of employee/agents to infiltrate the workforces of targeted employers, just as was predicted by the Fourth Circuit.[10] Employers have been rendered helpless to avoid hiring such known agents without committing, under the Board's policy, an unfair labor practice. *See Town and Country Electric*, Case No. 18-CA-11044, *case pending* (NLRB) (mass applications of union agents lead to finding of unfair labor practice). In another recent case, the Board's General Counsel has argued that an employer must hire a paid union strike organizer as a striker *replacement*, because the Board's policy makes no distinction between professional organizer applicants and any other employee. *See Sunland Electric*, Case No. 15-CA-10618, *case pending* (NLRB). The importance of this issue is confirmed by

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[10] In *H.B. Zachry Co. v. NLRB*, 886 F.2d at 73-74, the court observed: "[The union agent] because of his simultaneous employment with the union, would essentially be paid by the union to cast his ballot in its favor. * * * If the practice here is accorded judicial approval, a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results."

the decision of the Board to hold a rare oral argument to review its policies in this area. No change in the Board's position has been forthcoming, however. *See* 54 Daily Labor Report (BNA) A-14 (March 19, 1992).

Therefore, in order to preserve the balance struck by Congress as to each aspect of national labor policy set forth above, this Court should grant the present petition and reestablish the common sense and common law distinction between professional union organizers and bona fide employee applicants.

## CONCLUSION

For the foregoing reasons, petitioners pray that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted

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Date: October 16, 1992

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Rule 29.1 Statement. The petitioner, Willmar Electric Service, Inc., has no parent or subsidiary companies.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 8, 1992 Decided July 21, 1992

No. 91-1312

WILLMAR ELECTRIC SERVICE, INC.,

*PETITIONER*

v.

NATIONAL LABOR RELATIONS BOARD,

*RESPONDENT*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 46, AND MICHAEL HENDRIX,

*INTERVENORS*

Petition for Review of An Order of the National Labor Relations Board

*Maurice Baskin* for petitioner.

*John H. Fawley*, Attorney, National Labor Relations Board, with whom *Jerry M. Hunter*, General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter Winkler*, Supervisory Attorney, were on the brief, for respondent.

*John Burns* for intervenors.

Before: BUCKLEY, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge WILLIAMS*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

WILLIAMS, *Circuit Judge:* This petition raises the issue of whether the word "employee" in § 2(3) of the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. §152(3) (1988), encompasses a job applicant who is employed by a union at the time of application, seeks the job for the purpose of organizing the work force, plans to retain some kind of employment affiliation with the union, and has at least a substantial prospect of later returning to full-time employment by the union. If the applicant, Mike Hendrix, was an "employee" as the Act uses the term, he was entitled to protection from anti-union discrimination and coercion, see, e.g., § 8(a)(3) of the Act, 29 U.S.C. §158(a)(3) (1988). If he was not, then petitioner Willmar Electric Service was free to reject his job application without satisfying the National Labor Relations Board's test--i.e., without showing that it would have rejected him without regard to those aspects of his relation to the union that the Act protects (e.g., membership, protected union activities). See *Wright Line*, 251 NLRB 1083 (1980) (in "mixed motive" case, to establish unfair labor practice general counsel must show that an anti-union motive animated the decision; employer can avoid liability by showing that it would have made the same decision in the absence of the anti-union motive), enf'd, *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line).* The Board ruled that despite his employment relation with the union, Hendrix was an employee for purposes of § 2(3), so that Willmar's refusal to hire him on the ground of his union activities --which Willmar does not here seek to defend under the *Wright Line* rule--violated §§ 8(a)(1) & (3). Accordingly the Board found that Willmar had committed an unfair labor practice. We find the Board's reading of § 2(3) permissible and grant its application for enforcement.

* * *

Hendrix, a journeyman electrician by trade who had just begun working as a field organizer for the relevant local of the International Brotherhood of Electrical Workers, contacted Willmar in June 1988 about the possibility of using unionized labor for its electrical work at a nearby construction project. Over the next several months it became clear that Willmar did not want to deal with the union. In October Hendrix submitted an application on behalf of himself for a job as an electrician, in which he listed his present employer as the IBEW and his reason for leaving as to "work in the field", by which Hendrix meant (according to his later testimony) that he would "be going into the field to organize actually on the job." And so, while he would "probably" stop receiving money from the union and take a cut in pay, he would "retain the title of field organizer." Hendrix made clear to Willmar's project foreman, Douglas Rose, that he intended to use his free time during lunch and after work to try to organize Willmar's employees. As he waited for a response, Hendrix continued engaging in activities on behalf of the union, such as organizing a picket line at Willmar's job site to protest the wage level. In December Rose told Hendrix that, although he was still hiring, he was not giving consideration to Hendrix's application, because "it's kind of hard to hire you when you're out there on the other side, picketing."

In September of 1989 an administrative law judge held that Willmar had violated §§ 8(a)(1) and 8(a)(3) of the Act by failing to hire Hendrix and by engaging in other coercive or discriminatory acts (including the failure to hire a man named Allen Haugen because of his suspected union sympathies). The NLRB affirmed the ALJ's rulings. Since Willmar's petition for review challenges only the holding with respect to Hendrix, we address only this order and enforce the other orders without comment.

* * *

The chief issue on appeal is whether employment ties to a union of the sort held by Hendrix bar a person from classification as an "employee" (of some entity other than the union) under § 2(3), and thus remove him altogether from the protections of §§ 8(a)(1) & (3). A few preliminary remarks are necessary to narrow this issue.

First, it makes no difference that Hendrix was not working for Willmar at the time of the alleged unfair labor practice. Applicants for employment are considered "employees" under the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). So the refusal to hire Hendrix is legally indistinguishable from the firing of an employee of a company who reveals that he has just established similar ties to a union.

Second, despite Hendrix's employment ties to the union, there is no real claim that Hendrix's hoped-for job with Willmar would have been a sham. In most respects Hendrix would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests. Obviously, however, his then-current job with the union (which was typical in the sense that applicants often held jobs that they would drop if accepted by Willmar) his retention of a vague union title, and his prospect of re-employment by the union might have had various subtle (or perhaps not so subtle) effects on his conduct as a Willmar worker. The nub of the controversy is whether Hendrix's employment ties to the union disqualified him from being a Willmar employee enjoying full protection of the Act.

Our analysis begins with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the inquiry whether Congress clearly resolved the issue. *Id.* at 842-43. As moonlighting is widespread, it is plain that the word "employee" cannot exclude concurrent employment generally.

Once that (obvious) step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history. But in fact closely related legislation, the Labor Management Relations Act, manifests a congressional assumption that an employee may be employed by a union and another entity. Although its § 302 generally prohibits payments from an employer to an employee of a union, it excepts from that ban payments made "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer". 29 U.S.C. §186(c)(1) (1988).[1] Willmar points to nothing in the legislative history that would overcome this implication.

The Supreme Court recently stated a presumption that a statutory use of the term "employee" should be taken to have its common law meaning unless Congress "clearly indicates otherwise", *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992), observing wistfully that after each of two prominent decisions in which the Court ventured beyond the common law guidelines, one of them a decision construing the NLRA *(NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)), Congress had "amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning", 112 S. Ct. at 1349. As the Court noted, the NLRA "defined 'employee' to mean (in relevant part) 'any employee'", *id.* at 1349 n.4, i.e., it failed to indicate rejection of the common law model.

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[1] This exception completely undermines Willmar's claim that §8(a)(2) of the NLRA, 29 U.S.C. §158(a)(2) (1988), forbidding employer financial support of a union, and § 302 of the Labor Management Relations Act, forbid the employment of someone situated as Hendrix is. So long as Willmar gets a day's work for a day's pay out of Hendrix, it violates neither provision.

Under common law principles "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency § 226 (1958); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (recognizing that under the common law a servant can have two masters in a variety of relations); *Dellums v. Powell*, 566 F.2d 216, 222 & n.22 (D.C. Cir. 1977) (same). Until such time as an employee "abandons" the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act.

Against this, Willmar presses the point that Hendrix's employment relation to the union would subject Willmar to intolerable risks of disloyalty. A similar concern played a large role in the Fourth Circuit's recent holding that a full-time union employee, who proposed to continue as such even if his application should be accepted by the proposed non-union employer, could not be an "employee" under § 2(3), *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989). The court said that the "term [employee] plainly does not contemplate someone working for two different employers at the same time and for the same working hours", *id.* at 73. (It was stipulated in *Zachry* that the individual would remain employed and supervised by the union "even during the precise hours he was to work for Zachry." *Id.*) See also *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (similar reading of "employee"); but see *NLRB v. Henlopen Manufacturing Co., Inc.*, 599 F.2d 26 (2d Cir. 1979) (rejecting *Elias* without explanation).

This risk of disloyalty is surely not to be discounted. Indeed, we are ready to assume *arguendo* that Willmar made out so powerful a case of likely disloyalty that the Board would have had to conclude that rejection of Hendrix's application *on that ground* would have been legitimate and not in violation of the anti-discrimination and anti-coercion provisions of the Act.

"Nothing in the Act prevents an employer from disciplining or discharging an employee for disloyalty". *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061,1064 (D.C. Cir. 1992). An employer may dismiss an employee for arson (or propensity to arson), but if the arsonist is also a union member and proves that the employer fired him for organizing activity, the employer may not evade the *Wright Line* rule by saying that arsonists are not "employees"; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities.

Willmar invokes two further specters. First, it suggests that there might be anomalies in Hendrix's participation in a vote at Willmar on union representation. See also *H. B. Zachry v. NLRB*, 886 F.2d at 74-75. But Hendrix's qualification as an "employee" is not the same as eligibility to vote; he could be included in a bargaining unit only if found to share the necessary community of interest with other workers. See, e.g., *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985) (employees related to owner/managers not permitted to vote). To the extent that Willmar's arguments have force, they can be raised at that stage. But the existence of that issue on the horizon is not in itself a reason to deny Hendrix the protection of the NLRA at the hiring stage.

Willmar also points to decisions such as *NLRB v. Babcock & Wilcox Co., 351 U.S.* 106 (1966), see also *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841(1992), carefully distinguishing between the right of union members who are employees to use employer property for their advocacy, and the much more limited rights of non-employees. We see no conflict. That Hendrix's employment would give him a better perch from which to propagandize is true, just as it would be true for any union zealot who got a job with Willmar. Willmar's reading of § 2(3) is quite unnecessary to prevent any anomaly on this score.

We hold, then, that the NLRB could reasonably determine that Hendrix or anyone else who is employed simultaneously by a union and a company is an "employee" under § 2(3) of the Act, leaving to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground.

Accordingly, we deny Willmar's petition for review and grant the NLRB's cross-application for enforcement of its order.

*So Ordered*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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WILLMAR ELECTRIC SERVICE, INC.

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46

Case 19—CA—20137

MICHAEL C. HENDRIX, an Individual

Case 19—CA—20138

## DECISION AND ORDER

On September 1, 1989, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed a response. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order.

The sole issue remaining in dispute in this case is whether the judge correctly concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Michael Hendrix, who was employed full time as an organizer for the Union at the time of his application for a job with the Respondent. In exceptions, the Respondent contends, *inter alia*, that it could lawfully refuse to hire Hendrix on the basis of his status as a paid union organizer because such an individual is not an employee within the meaning of Section 2(3) of the Act. For the reasons set forth below, we find no merit in this argument.

Michael Hendrix is a journeyman electrician. On June 23, 1988,[1] Hendrix began working as a full-time field organizer for the Union. During June and July, Hendrix contacted the Respondent about entering into an agreement with the Union for the Respondent's electrical subcontracting project at a J. C. Penney store under construction in Silverdale, Washington. For the remainder of the year, Hendrix had frequent conversations with the Respondent's officials about this subject.

Beginning on or about August 30 and continuing into January 1989, Hendrix also communicated on several occasions with the same officials about job prospects both for himself and for other local union members. On October 14, Hendrix delivered his own and another electrician's completed job applications to the Respondent's project foreman, Douglas Rose. These were the first local job applications received from outside the company. In subsequent communications with the Respondent's officials, Hendrix expressed his continuing interest in working for the Respondent, noting in particular the appeal of a jobsite close to his residence. On December 30, Hendrix telephoned Rose and asked if the Respondent was hiring and had considered his application. Rose stated he was hiring but had not considered Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing." (Hendrix had engaged in area standards picketing and handbilling protests at the Respondent's jobsite from November 30 until December 15.) Hendrix told Rose to consider him seriously for a job, that obtaining employment to carry out field organizing responsibilities is customary activity for field organizers, and that Hendrix would be organizing during lunch and after work. The Respondent never offered Hendrix a job.

Although not mentioned in the judge's decision, Hendrix testified that union officials knew about his application for

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[1] All dates are in 1988, unless otherwise indicated.

employment by the Respondent, but that he received no direction from the Union to seek employment with the Respondent. Hendrix testified that seeking employment was normal activity for field organizers. In his testimonial opinion, he would have to take a leave of absence from employment with the Union if hired by the Respondent, but he would retain his title as field organizer. He also testified that he would be paid only by the Respondent for work performed for it. He did not know whether the Union would reimburse him for any shortfall in compensation, but he was willing to take a reduction in pay to work for the Respondent.

As set forth fully in the judge's decision, he found that during December and January 1989 the Respondent manifested an antiunion hiring policy through the violation of Section 8(a)(3) in refusing to hire applicant Haugen and through several antiunion statements made by Rose in violation of Section 8(a)(1). There are no exceptions to these findings. The judge also concluded that the Respondent violated Section 8(a)(3) by refusing to hire Hendrix because of his union activities. In the discussion supporting this conclusion, the judge stated, "That Hendrix was a paid, fulltime union organizer, intent upon organizing Respondent's employees, is of no moment." In support of this statement, the judge cited *H. B. Zachry Co.*, 289 NLRB 838 (1989), in which the Board found an unlawful refusal to hire a paid, full-time union organizer. In its exceptions, the Respondent supports its argument that paid full-time union organizer Hendrix is not a protected employee within the meaning of Section 2(3) of the Act by reference to the opinion denying enforcement of the Board's Order in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), a decision that issued after the judge's decision in this case.

After careful review of the Fourth Circuit's analysis in *Zachry*, we adhere to the Board's holding in that case that individuals who are full-time paid union organizers while ap-

plying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status.[2] In any event, we find that this case is factually distinguishable from *Zachry* on points critical to the Fourth Circuit's determination that the paid union organizer there should be excluded from the statutory definition of employee.

In *Zachry*, the court held that an employer could lawfully reject a job applicant who would be simultaneously paid and supervised by the union. In support of this holding, the court emphasized stipulated evidence that Edwards, the paid union organizer/job applicant at issue, planned to remain concurrently employed and supervised by the union during his hours of work for Zachry and would have been performing services for Zachry only because directed to do so by the union. In addition, the union would have paid Edwards for the difference between his salary at Zachry and his full union salary, for his health, life insurance, and pension benefits, and for daily transportation expenses and living expenses related to the Zachry job.

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[2] It is a well-established principle of Board law that the Sec. 2(3) definition of employee includes applicants for employment. Accordingly, prospective employee applicants are entitled to the same statutory protection against antiunion discrimination as current employees, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940); and paid union organizers are entitled to the same protected Sec. 2(3) status as other applicants, *Oak Apparel*, 218 NLRB 701 (1975). An employer may, however, lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer. The Respondent here did not prove that it refused to hire Hendrix pursuant to any such nondiscriminatory policy. In this regard, we reject the Respondent's contention that it did not hire Hendrix because he was only interested in a foreman's job for the reasons discussed by the judge.

Here, by contrast, Hendrix's uncontroverted testimony is that: he received no specific direction from the Union to seek employment with the Respondent; if hired by the Respondent, he would have to take a leave of absence from employment by the Union; he would limit any organizational activity to personal time at lunch and after work; he would not receive direction from the Union during hours of work for the Respondent; he was willing to take a reduction in pay to work for the Respondent; and he did not know whether the Union would reimburse him for any shortfall in compensation. In sum, although Hendrix clearly intended to serve the Union's organizational interests as an employee of the Respondent, there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for the Respondent. Furthermore, there is no evidence that Hendrix would terminate his job with the Respondent at the end of any organizational campaign rather than at the completion of a job project conveniently close to his home.

Although we adhere to the Board precedent set in *Zachry* and cases cited therein, we believe that the aforementioned circumstances in this case indicate that Hendrix would not have been "[an employee] working for two different employers at the same time and for the same working hours."[3] Therefore, his job application did not raise the same concerns about divided employment loyalties and interests which underlay the Fourth Circuit's conclusion in *Zachry* that paid organizer Edwards was not entitled to antidiscrimination protection as an employee within the meaning of Section 2(3) of the Act.

Based on the foregoing, we find that Hendrix was an employee within the meaning of Section 2(3). In agreement with the judge's analysis of the Respondent's motivation for refusing to hire Hendrix, we affirm the finding that this refusal violated Section 8(a)(3) and (1) of the Act.

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[3] *H. B. Zachry Co. v. NLRB*, supra at 73.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Willmar Electric Service, Inc., Silverdale, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order. Dated, Washington, D.C. May 31, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

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WILLMAR ELECTRIC SERVICE, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46

Case 19—CA—20137

and

MICHAEL C. HENDRIX, an Individual

Case 19—CA—20138

*Max Hochandel Atty.*, of Seattle, WA,
for the General Counsel.

*Judd Lees, Atty.* of *Williams, Kastner, & Gibbs*, Bellevue, WA,
for Respondent.

*John Burns, Atty.*, of *Hafer, Price, Rhinehart & Schwerin*, of Seattle, WA,
for the Union.

## DECISION

RICHARD J. BOYCE, Administrative Law Judge

### I. Statement of the Case

This matter was tried in Seattle, Washington, on April 6 and 7, 1989. The consolidated complaint, based on charges filed by International Brotherhood of Electrical Workers, Local Union No. 46 ("Union") and Michael C. Hendrix, issued on

February 22, 1989, and alleges that Willmar Electric Service, Inc., ("Respondent") violated Section 8(a)(3) and (1) of the National Labor Relations Act ("Act") by failing to employ Hendrix and Allen Haugen for its job on a J.C. Penney store in Silverdale, Washington, in late 1988.[1]

The complaint also alleges that Respondent, by its project foreman, Douglas Rose, independently violated Section 8(a)(1) in seven instances in late 1988 and early 1989: by asking a job applicant in November if he was "connected with a union," by subsequently telling an employee there was "no way [he] would hire any union people," by asking an applicant on about December 28 if his previous employers "were union contractors," by telling an applicant on about December 30 that it would be "hard to hire" him and that Rose "would not do so" because the applicant had picketed at the jobsite, by asking an employee on about January 9 if he knew their "little union buddy" Hendrix, by telling an employee on about January 16 that a no-applicants sign at the jobsite "was intended only for applicants affiliated with a union," and by asking an employee on about February 7 "if he had been contacted by an agent of the [National Labor Relations] Board."

## II. Jurisdiction, Labor Organization

Respondent is a multi-state electrical contractor headquartered in Willmar, Minnesota. The complaint alleges, the answer admits, and I conclude that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

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[1] Section 8(a)(3) forbids an employer from "discriminating in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7" of the Act. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

The parties also agree and I conclude that the Union is a labor organization within Section 2(5) of the Act.

## III. The Alleged Unfair Labor Practices

### A. Evidence

Respondent is the electrical subcontractor on a J.C. Penney store under construction in the Silverdale Mall, Silverdale, Washington. Douglas Rose, a journeyman electrician, is its project foreman. He reports to Bryan Johnson, regional projects manager, who is located in Aurora, Colorado, and to Johnson's superior, Timothy Imdieke, operations manager, who works out of the home office in Willmar. Imdieke testified that, while he and Johnson "work together with" Rose as concerns hiring for the Silverdale project, Rose is empowered to hire independently within prescribed manpower limits.[2]

Respondent contracted for the job in the early summer of 1988; and Rose, unassisted, started doing preliminary work on the site in August. Rose hired his son, Todd, as an apprentice in early September. Jack Hitt, a journeyman recently on another of Respondent's projects, joined the crew in mid-October. Rose's affidavit states that Hitt was "responsible for orienting the newer employees to the work" as later hirings occurred. The complement grew to ten on January 3 and 4, with the addition of three journeymen and four apprentices. All seven came from the surrounding area and none had worked for Respondent before.

Respondent thereafter continued to hire apprentices or trainees from the surrounding area. The several journeymen it later hired had been on its payroll before, however, and came from afar.

Imdieke testified that Respondent has been party to a union contract only once that he knows of, on a 1984 project. Asked

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[2] Mirroring this, Rose states in his affidavit that he does "all the reviewing and final approval of applications locally."

if Respondent ever hired union members, Imdieke testified, "That's a tough one"; then added, "I basically wouldn't know, . . . but at times [employees] have mentioned that they belong to an organization."[3] Rose testified that he does not have the "slightest idea" if the Silverdale payroll includes members, nor does he "really care." The record contains no evidence that any of those hired for that project was then a member.

Hendrix is a journeyman electrician. He has been a full-time field organizer for the Union since June 23, 1988, having taken a leave-of-absence from his position with an electrical contractor.

In late June, upon learning that Respondent would be the electrical subcontractor on the Penney project, Hendrix called Imdieke, asking about Respondent's manpower needs. Imdieke said he had not "looked at" the situation yet, but probably would be getting to it "in a couple weeks."Hendrix called again in mid-July, expressing an interest "in sitting down and talking. . . about a contract"for the project. Imdieke told him to send a copy of the Union's standard contract, and that he would "get with"his boss about it.

Hendrix thereupon mailed Imdieke a rough draft of the Union's newly ratified contract. The two then had a telephone conversation on July 25, in which Imdieke said that Respondent was "not interested in signing any kind of agreement, but . . . would be interested in looking at some of the [Union's] people." That was followed by a letter from Hendrix to Imdieke, dated July 27, in which he proposed "a one-project agreement that will not bind you to any other projects in the country."

Hendrix first met Rose on a visit to the jobsite in August 30. Introducing himself as a union organizer and tendering his business card, he asked Rose about job prospects and, as he had

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[3] Thus, Imdieke went on, an employee in Danville, Virginia, "mentioned he belonged to a local . . . in the last couple of months."

with Imdieke, broached the idea of Respondent's signing a project agreement. Rose responded that "things were really slow"on the project, the implication being that those matters were of no immediate concern, and the conversation turned to hunting and fishing.

In the aftermath of this first encounter with Hendrix, Rose entered in his daily job log:

> IBEW labor organizer came to jobsite, seems to have vast knowledge of [Respondent]. Wants us to sign a labor agreement, said he has talked to Tim, etc. Mostly small talk but what he comes out with gives me the impression that they have targeted [Respondent] for the infiltration of union members.

Rose's log reveals that he and Hendrix had a second conversation on September 1, with Hendrix saying he would like to have a job application form before Rose began hiring. Hendrix added that he was not working in the trade, according to the log, and summarized his qualifications as an electrician. Rose responded that he had no applications. Following that conversation, still tracking the log, Rose "discussed the union issue" with Imdieke and Johnson, and they "decided to not give out applications until all angles have been checked." Asked what he meant by "all angles," Rose testified: "You'll have to ask them [Imdieke and Johnson]. . . . That was the reply I got when I talked to Tim."

On September 2, Rose and Johnson resumed the previous day's conversation. Rose's log states: "Discussed hiring policies concerning union help, discrimination." The record provides no additional information concerning the exchange. Rose testified that he also spoke with the Associated Builders and Contractors, to which Respondent belongs, at about this time; and was told, in answer to his queries about the Union, that it is "bad news."

Hendrix continued to call on Rose with some regularity. In the early visits, at least, they chatted congenially and at length about hunting and fishing, although Hendrix generally interjected the subjects of an agreement and hiring, as well. According to Rose's affidavit, his customary rejoinder, when Hendrix raised those subjects, was that Respondent "went through the State for applicants" and that it was "nonunion and wanted to stay that way."

On September 7, Hendrix asked Rose for an application. Rose replied that he had none; that he thought the home office "was going to do the hiring" and Hendrix therefore should "contact" it; and that Respondent "probably" would not need help until about December. Hendrix, in his role as field organizer, consequently wrote Imdieke on September 9, stating:

> I have been in contact with your foreman . . . in Silverdale, Washington. He has indicated to me that your office would be doing the hiring in Willmar.
>
> I am still interested in signing a project agreement with your Company and offering our qualified Journeymen to your Company. Please consider this offer.
>
> Doug [Rose] said that he did not have any employment applications on site and that I should contact you at your office. Would you please send me one of your application. [sic]

First conferring with Respondent's labor attorney in Minneapolis, Imdieke mailed Hendrix an application on about September 16.

In late September, Rose told Hendrix that he foresaw a crew of "somewhere around 10 to 15" electricians, and that he was "going to pursue" local hiring.

On October 14, Hendrix delivered two completed applications to Rose, one being his own. Rose testified that these were the first he had received "except for people within the company."

He and Hendrix had a "very brief" attendant conversation, in which Hendrix "verified"his work experience and stated, as he was to do several times, that a job with Respondent especially appealed to him because "it's right over the hill from [his] house."

Where his application asked for "Position Desired," Hendrix entered: "Journeyman-Foreman Electrician." Rose inferred from this, so he testified, that Hendrix was interested only in being a foreman. Hendrix testified that he did not tell Rose this, however, and the record contains no intimation that Rose questioned him on the point. [4]

Rose sent Hendrix's application, but not the other one, to Imdieke. In his covering note, he stated:

> Mike Hendrix came in today and left two applications. Please note the date of the application. [5] In reading over his application I've noticed he is applying for a foreman position. He also states he has had a strained back. Also, you'll notice he is presently working for 21.00.
>
> The way I see it, he is already working, has a questionable back, and if he was hired as a foreman, I'd have nothing to do. My opinion is WES should not hire him at this time, however, you may have a position for him up there. I'll keep in touch.

Upon receiving the application, Imdieke again conferred with Minneapolis counsel. He testified that he then "talked briefly" with Rose, who remarked that Hendrix was seeking his

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[4] Hendrix testified that he would have taken "whatever they had"; that he "would have went to work as a grunt for them."

[5] Hendrix entered two dates on his application: September 28 at the top and October 10 on the signature line. He testified that he began filling it out on the 28th and finished on the 10th.

foreman's job; and that he, Imdieke, rejoined: "Well, that's not my policy. He wouldn't be foreman."[6]

On November 7, journeyman Newell Casavant submitted an application. He testified that Rose mentioned in the accompanying conversation, that Hendrix had "come by" and that Respondent "might be going union"; and asked Casavant "how [he] felt about that." Casavant assertedly replied that "it didn't bother" him.

Another Journeyman, Jerry Jones, applied on November 17. The following week, he testified, he told Rose he had gained his experience "through the Union," prompting Rose to ask if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop." Jones replied, as he recalled, that he had "hard feelings against" the Union and was no longer a member; and Rose remarked, "Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion."

Rose admittedly asked Jones how he felt about working for a nonunion shop. He explained:

> I asked a lot of people that. I ask that because of the possibility of picketing, and I asked people a lot of times, "Do you have any problems crossing the picket line, does that bother?"... There are several questions like that, just general stuff.

Jones further testified that Rose told him, in November, that he "liked to hire locally because you could give the economy a boost," and that he intended to hire from 16 to 20 people.

On November 30, Hendrix and two others began picketing Respondent at the jobsite. The signs stated: "Willmar Electric,

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[6] Imdieke testified that his "general practice and a good practice" regarding the hiring of foremen is: "It's got to be somebody I know and somebody that came up through the ranks."

Substandard Wages." Picketing continued until December 15. Hendrix estimated that he participated "the majority of the time." The picketing was preceded by letters to Respondent and the general contractor, on union stationery and signed by Hendrix, detailing the inadequacy of Respondent's wages and benefits relative to area standards, and informing them of the impending picketing. Hendrix and others distributed leaflets at the site, as well.

On December 14, as revealed by the records of the Washington State Employment Service, Rose advised its Bremerton office that Respondent "need[ed] journeymen and other experienced electricians." Rose's affidavit states that, while he did not specify how many employees he was seeking, he "was actually looking for . . . 5 journeymen and 4 or 5 apprentices on this job." Then, on December 27, as disclosed by Employment Service records, Rose told it that Respondent had "all the inexperienced help needed," but still invited the referral of "journeymen and other experienced electricians." This stood until January 13, when Rose instructed the Employment Service that Respondent's needs had been met. These records and his affidavit to the contrary, Rose testified that he was "mostly looking for apprentices" when he placed the December 14 order, because he "had made up [his] mind who [he] was going to be putting on as a journeyman already"; and that he was not seeking journeymen, in late December inasmuch as he "had made a decision to put on" Casavant, Jones, and one Ray Gauthier "prior to" that.

Haugen, a journeyman electrician and a member of the Union, entered the picture on December 28. Having obtained an introduction card from, the Employment Service, he called Rose that afternoon, requesting an interview. Haugen testified that Rose asked if he was a journeyman or a trainee; exclaimed, "Oh, great!" upon Haugen's saying he was the former; and urged Haugen to come to the site "right away." Rose also stated, per

Haugen, that Respondent "had all the trainees [it] needed," but that he still "wanted" journeymen.[7] Rose concedes that Haugen "probably" identified himself as a journeyman; and that he in turn said, "Good," and invited Haugen to come to the site. He denies telling Haugen, however, that he "need[ed] journeymen."

Haugen arrived at the site and filled out an application a few minutes later. He testified that others also were filling out applications; that he heard Rose ask another, unidentified person, "How many of these guys do you want?"; and that the other person replied, "As many as you can get."

When Haugen handed his application to Rose, Rose asked about his work experience. Haugen answered that he had had "a lot of experience working at the mall," including nine months during its construction and in the Sears and Bon Marche stores. Rose then asked if Haugen's past employers were unionized, according to Haugen, and he said they were. Rose presently brought the interview to an end, Haugen testified, by saying the application "look[ed] good," and that he would "make a few phone calls and . . . get back to" Haugen.

Rose would have it, on the other hand, that he said Respondent "didn't need any more journeyman electricians," that he had "made up [his] mind who [he] was going to hire already," and that he "would put [Haugen's] application in the file."[8] Asked if he inquired about Haugen's union status, Rose answered, unresponsively, that he was "very busy that day," and

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[7] Haugen later testified that either Rose or the Employment Service told him this, and that he "believe[d] it was [in] the phone conversation with Mr. Rose."

[8] Rose states in his affidavit that, before Haugen's arrival on the 28th, he "had already called the State to tell them [he] was full earlier that day." He acknowledged in his live testimony that he could not recall that.

that his exchange with Haugen was "just a quick where-have-you-been-working, are-you-from-the-area type of thing."[9]

On December 30, Hendrix called Rose, asking if he was hiring; and, by Hendrix's account, this exchange ensued:

Rose: "Yes, we're hiring right now, looking for guys."

Hendrix: "Have you considered my application?"

Rose: "Which one?"

Hendrix: "Mine."

Rose: "Oh, not really."

Hendrix: "Why not?"

Rose: "Well, it's kind of hard to hire you when you're out there on the other side, picketing."

Hendrix: "I'm not picketing anymore."

Rose: "You were picketing."

Hendrix: "Well, I'm not anymore."

Rose did not explicitly deny any of the foregoing in his live testimony. But, asked if he *recalled* telling Hendrix "he would not be hired because he picketed the company," Rose replied, "No, I do not." In his affidavit, on the other hand, he denies telling Hendrix "that [he] could not hire him because he was picketing and/or was on the other side."

The remainder of the conversation, by more or less mutual agreement, consisted of Hendrix's saying he was experienced in the "kind of work" Respondent was doing and would do "a good job"; that all his past employers "would give [him] an A-1 rating"; and that he had been "in the industry for 10 years."

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[9] Rose's affidavit asserts that he "did not ask [Haugen] any questions about his union affiliation," but that he "did tell him it was a nonunion job." Haugen had asked if it was "a union job," according to the affidavit, and offered that his last job "was union."

Hendrix also told Rose that, if hired, he "would be organizing during the lunch hour." He then suggested that Rose "wouldn't like that," and Rose agreed. Hendrix testified that to "obtain employment . . . to carry out . . . field organizing responsibilities" is "normal activity for field organizers."[10] As the conversation wound down, Rose said he "hadn't looked at" Hendrix's application. Hendrix urged that he "seriously take a look at it and consider [him] for a job," and that he "let [him] know one way or the other."

Among the entries in Rose's log for the 30th is this:

> Mike Hendrix said he'd like to come to work with our understanding that he would be trying to organize the crew during lunch and after work.

During the first week of January, journeyman Joseph Lesh gave Rose his application. Lesh testified that Rose told him he "would be hiring" and would "get back to" Lesh. [11]

On January 4, not having heard from Rose, Haugen telephoned the job. Rose's wife, Sandra, employed as Respondent's secretary, answered, saying Rose was busy and to call back in half an hour. Sandra testified that she then spoke to her husband, who told her he was no longer hiring. When Haugen called back, Sandra said Respondent had "hired all the people [it was] going to hire," but would keep his application on file. Haugen, voicing the suspicion that he was not hired because he is "union,"asked to speak to Rose, saying he wanted

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[10] Hendrix opined that if hired by Respondent, he would retain his title as field organizer, but that his pay "would stop from the IBEW." He did not know if the Union would make up the difference should working for Respondent entail a pay cut.

[11] Lesh never did hear from Rose. He testified that a past employer listed on his application, Evergreen Electric, is "a union outfit."

to "explain some things." Sandra said Rose was too busy to come to the phone, terminating the conversation.

Apparently on the 4th, as well, Rose received a "cluster" of six applications sent by Hendrix. [12] One had been filled out and signed by journeyman Dwayne Macomber; the others had been filled out and signed by Hendrix on behalf of people on the Union's out-of-work list from, whom, he had obtained permission. On January 6, Macomber called Rose about the status of his application. Rose "expressed ignorance of it," as Macomber recalled, but said he would check and call back. [13] Rose called the next day, reporting to Macomber that he had "only just received" the application, that "all positions were filled," and that he would keep the application on file.

By letter dated January 6, Rose returned the six applications to Hendrix. The letter states, variously, that Respondent's practice" is to "hire employees on an individual basis or, when necessary, through a local job service," and not "through any other organizations, recruiters, etc."; that those "seeking employment in the electrical field should apply in writing a letter, along with their resume," to the home office; and that, "at the present time, we have filled our employment needs for this project."

Macomber testified that he called Rose again a couple weeks later, and that Rose said the six applications "were unacceptable," explaining that Respondent "couldn't accept applications from a labor organization." Macomber asked if Respondent had rejected his application because of his union

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[12] The record is unsettled regarding the date of receipt. Hendrix's cover letter is dated December 21, Rose's affidavit states that he received the applications on about the 27th, and Rose's log states that he got them on the 4th. The log presumably is the most reliable.

[13] Upon his receipt of them, Rose sent the six applications to Respondent's Minneapolis counsel.

membership, he recounted, and Rose answered, no, that Respondent had "union people on the job."

Rose did not address these conversations with any specificity in his testimony. Asked generally if he ever said "there was no way [he] would hire any union people," he testified:

> I don't believe I made that statement at all. That would be a silly thing for me to say. We joke around a lot. I just would not say that, no.

On January 9, a Monday, Rose asked apprentice employee Lafayette (Dean) Brooks, if he knew Hendrix. Hendrix had passed out leaflets at the site the previous Friday, engaging Brooks in a several-minute conversation as Brooks left the job. Not knowing Hendrix by name, Brooks asked Rose whom, he was referring to. Rose answered that Hendrix was "our little union buddy." Brooks then affirmed that he had spoken with Hendrix. Rose testified that he called Hendrix his "little union buddy on several occasions" in conversation with employees.

On January 14, Haugen called again, this time speaking to Rose. He stated that he did not intend "to cause any union problems at all"; that "a union person can do a high-quality job and not cause any problems." Rose shot back that "being a union member or not ha[d] no bearing" on his hiring decisions; that Haugen was "not the only one that had called and said" the contrary; and that he was "tired of hearing that."[14] Rose added that he would not be hiring again "till June or July."

In mid-January, Jones, one of the three journeymen to start on January 3-4, told Todd Rose that he had a friend who would make a good apprentice for Respondent, but that he was discouraged from pursing the matter because of the recently-posted sign that Respondent was not accepting applications. Todd came

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[14] The State Employment Service questioned Respondent whether it was hiring around union members.

back: "[T]hat's just for the Union. If he's any good, just tell my father, and they'll just bypass that."

Soon thereafter, Rose asked Jones if he knew of a good prospect. Jones answered, "Yes, but your sign says that you're not taking applications." Rose stated, by Jones' uncontradicted account, that the sign was "just for the Union's benefit." Jones' friend, Steve Medlock, submitted an application on January 20 and was promptly hired.

Rose admittedly continued to take applications despite the sign. He denies, however, that the sign was calculated to thin out union-member applicants. The reason for it, he testified, was that he "did not have time for a lot of people coming in and out" because "there were some changes in J.C. Penney's plans that needed to be addressed immediately."

On January 17, Rose fired Dean Brooks. Jones testified that Todd Rose had commented, the day before: "Well, we found out who the union rat is. It's a guy named Dean Brooks." Todd went on, according to Jones, that Respondent would remain nonunion "by not hiring union people"; that his dad "puts a check on people somehow" and "wouldn't hire" anyone known to be "for the Union." Jones' recital continued that, after Brooks' termination, Todd remarked that Respondent had "killed two birds with one stone" inasmuch as Brooks "was not a good worker" and was "a union sympathizer." The record contains no evidence that Todd Rose performed supervisory or managerial functions for Respondent. He lived and often commuted to the job with his father, however; and Rose conceded--"sure"--that he talked to Todd about the union situation on the project.

On February 7, Jones testified, Rose said to him, that an agent of the NLRB had called Casavant; then asked if the agent had called him. Rose, averring that Casavant had "volunteered" to him that he had been called by a Board agent, admitted that he later conversed with Jones and other employees whether they had been called. Rose termed it "just common jobsite banter."

The Board agent was investigating the charges underlying the complaint herein.

Respondent offered neither Hendrix nor Haugen a job. Asked why he did not make an offer to Hendrix, Rose testified:

> I didn't think he was serious at all. I thought he was very serious about maybe putting some people from his organization on at work, but I didn't think that he was serious at all in his venture to go to work for Willmar Electric.

Rose testified that he did not take Hendrix's application seriously "because he was full-time working, expressed that he enjoyed his job very much, why come to work for me?" Two of the journeymen who began on January 3-4, Jones and Ray Gauthier, had their own electrical-contracting businesses, however, and were hired with the understanding that they would be leaving if their businesses picked up. Gauthier accordingly did leave in late January, to meet the needs of his business; then returned, on a part-time basis, in March. Attempting to distinguish the Hendrix situation from those of Gauthier and Jones, Rose testified, "It had to do with he was very happy with what he was doing and had no intention of quitting . . . and coming to work." Rose concededly "didn't even consider" asking Hendrix if he would quit his union job should Respondent hire him.

Imdieke, citing Hendrix's position with the Union and Respondent's stated perception that he was interested only in being a foreman, likewise testified that he "couldn't take" Hendrix's application "seriously."

Rose testified that he did not hire Haugen because:

> At that time, I had made a decision . . . to hire Ray Gauthier or Jerry Jones and Newell Casavant. And, also, at that time there was rumblings that there would be some transfers coming up [from Respondent's

other projects]. Mountain Home [Idaho] was running out of work. But, right at that very specific time, I needed ten people.

Casavant, Gauthier, and Jones all "walked in"; that is, they applied independently of the State Employment Service, the Union, or any other referral source. Rose testified that he told Casavant "on the first of December" that he could have a job; that he made similar commitments to Gauthier and Jones on December 15 and 27, respectively; and that he considered the three hired as of those times. Respondent's records and Rose's affidavit state, however, that Casavant was hired on January 4, Gauthier on December 30, and Jones on December 28.

Casavant testified that, while Rose told him in "the first part of December" that he "probably" could start on January 3 or 4, Rose did not confirm, that until the 3rd, when he told Casavant to report the next day. Casavant further testified that he quit his former job on December 23 because he was "tired" of it and "thought [he] had a pretty good chance of getting this job" with Respondent. Jones testified that Rose told him on December 27 or 28 to "come in and fill out some paperwork"; and that he complied on the 28th, at which time Rose directed him to report on the 3rd. Gauthier did not testify.

As previously noted, Respondent hired only former employees to meet its journeyman needs after January 3-4. The first of these was Junior Sam, who began on January 15. He was followed on February 6 by Willard King, on February 15 by Mike Froseth, and on February 16 by Jim Wirt. They had been on projects recently completed in either Mountain Home, Idaho, or Fallon, Nevada.

Rose testified, concerning the staffing of jobs: "I usually call the unemployment office. That's a standard procedure to pick up help from."Another "standard procedure," he testified, is to "talk to different people to see if there is, within the company, . . . people who are going to be coming in" from other

projects. His affidavit states that past employees "would be given first preference if they want to move here on their own." But Rose admittedly did not follow this latter procedure incidental to assembling the early January crew.

Imdieke testified that Respondent "prefer[s] transfers" over strangers; that his "concern" as projects are "shutting down," is to "keep them working"; and, with that in mind, that he discusses staffing with Johnson several times a week--what is "coming up," what is "shutting down," "where people are available, where they aren't."[15] Asked why Respondent had hired no former employees for the Silverdale project before Sam, Imdieke testified that "you have to have the need and you have to have the availability," and that "a little of both" was lacking earlier.

In mid-February, Respondent increased its employees' workweek to include eight hours of overtime. Jones testified that Rose explained:

> [W]e're not going to hire any more people. We're going to try and do it the way that we've been going. We like the crew and we like what's going on and . . . we're just going to start going on overtime.

Rose testified that the reason for the change was "to eliminate peaks and valleys in employment," and that he, Imdieke, and John Chapin, Respondent's president, participated in the underlying deliberations.

Rose previously had told Jones that Respondent "does not practice, as a rule, overtime," and would be unlikely to do so at Silverdale "unless Penney's picks up the tab." Rose acknowledged that Penney's "did not volunteer at any time to pick up

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[15] Even so, according to Imdieke, Respondent generally does not keep electricians on the payroll between projects. The weight of evidence indicates that the so-called transferees are treated as new hires at the next project. Respondent does not pay their moving expenses.

any overtime," and that "it's a known fact that overtime does not pay."

## B. Conclusions and Reasons

### 1. The Alleged Independent Violations of 8(a)(1)

a) That Rose asked an applicant, in November, if he was "connected with a union," and

b) said there was "no way [he] would hire any union people."

Crediting Jones, he told Rose in late November that he had gained his experience "through the Union," prompting Rose to ask if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop." Jones replied that he had "hard feelings against" the Union and no longer was a member, to which Rose remarked, "Well, you don't have to worry, because Willmar Electric is nonunion and it intends on staying nonunion."[16]

The Board decreed in *Rossmore House*[17] that the test for determining the legality of an interrogation is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[18] Since *Rossmore House*, the Board has reiterated its long-held position "that questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired."[19] The

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[16] Rose admittedly asked Jones how he felt about working for a nonunion shop, and did not disavow the other remarks attributed to him by Jones.

[17] 269 NLRB 1176 (1984).

[18] *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985), explaining *Rossmore House*.

[19] *Gilberton Coal Company*, 291 NLRB No. 50, sl. op. 13-14 (1988). See also, *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

conversation in which the subject questions were asked, occurring a few days after Jones had left off his application and before he was hired, was in the nature of a job interview. Rose therefore violated 8(a)(1) as alleged by asking those questions.

Further, by stating to Jones Respondent's resolve to stay nonunion, Rose necessarily conveyed the impression that an applicant's being openly prounion not only would be pointless, but would prejudice his job prospects. So doing, he additionally violated 8(a)(1) substantially as alleged.[20]

c) That Rose asked an applicant, on about December 28, if his Previous employers "were union contractors."

Crediting Haugen, Rose asked him, when he turned in his application on December 28, if his past employers were unionized.[21] This was a thinly veiled inquiry into Haugen's union feelings; and, occurring in the context of a job interview, was inherently coercive in violation of 8(a)(1).[22]

d) That Rose told an applicant, on about December 30, that it would be "hard to hire" him, and that Rose "would not do so," because the applicant had picketed the jobsite.

Crediting Hendrix, Rose told him during a telephone conversation on December 30 that he had not "considered"

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[20] *L.W. Le Fort Company*, 290 NLRB No. 45, sl. op. 1-2 (1988); *Big Star No. 185*, 258 NLRB 300 (1981); *Love's Barbecue Restaurant*, 245 NLRB 78, 80, 83 (1979).

[21] Instead of refuting Haugen, Rose testified unresponsively when asked if he had inquired about Haugen's union status. The denial in his affidavit does not offset Haugen's convincing testimony on the point.

[22] See fn. 19, *supra*, and accompanying text.

[23] Hendrix's testimony in this regard was altogether convincing. Beyond that, Rose did not enter an explicit denial, testifying only that he could not *recall* saying Hendrix "would not be hired because he picketed." The explicit denial in his affidavit, standing alone, deserves little credence.

Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing."[23]

Hendrix, when picketing to protest Respondent's wage and benefit levels, was an "employee" within Section 2(3) of the Act, engaged in an activity protected by Section 7.[24] Rose's remarks, by inherently tending to restrain Hendrix from engaging in that and similar activities, violated 8(a)(1) as alleged. [25]

e) That Rose asked an employee, on January 9, if he knew their "little union buddy"Hendrix.

Crediting the uncontroverted testimony of then-employee Lafayette (Dean) Brooks, Rose asked him on January 9 if he knew Hendrix. Brooks, not knowing Hendrix by name, asked who that was. Rose answered, "Our little union buddy."Hendrix had engaged Brooks in conversation the previous workday, while handbilling at the site.

Brooks reasonably could have inferred (as do I) that Rose's purposes in asking the question were to apprise him that his *tete-a-tete* with Hendrix had not gone unnoticed and to elicit information indicative of Brooks' union sympathies. The record contains no evidence that Brooks was openly prounion, whereas Respondent's antipathy to the Union was manifest. I therefore conclude, applying the totality-of-circumstances test mandated by *Rossmore House*, that Rose's question bore a restraining and coercive impact in violation of 8(a)(1).

f) That Rose told an employee, on about January 16, that a no applicants sign "was intended only for applicants affiliated with a union."

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[24] That he was picketing in the course of his employment with the Union makes no difference. *H.B. Zachry Company* 289 NLRB No. 117, sl. op. (JD) 4 (1988).

[25] *E.g., California Cooperative Creamery*, 290 NLRB No. 46 (1988); *Haco Engineering Company*, 265 NLRB 27 (1982).

Crediting Jones' uncontroverted testimony, Rose asked him, in mid-January if he knew someone Respondent might hire. Jones answered, "Yes, but your sign says that you're not taking applications." Rose rejoined that the sign was "just for the Union's benefit."[26]

By thus declaring Respondent's aversion to union-connected applicants, Rose violated 8(a)(1) as alleged.

g) That Rose asked an employee, on about February 7, "if he had been contacted by an agent of the Board."

Again crediting Jones, Rose told him on February 7 that an NLRB agent had called a coworker, Casavant; then asked Jones if the agent had called him.[27]

Interrogations of this sort, even under the guise of "common jobsite banter,"[28] tend to dampen employee cooperation with Board investigations unless accompanied by assurances against retribution. They consequently work to diminish employee rights under the Act. Accordingly, Rose's question violated 8(a)(1) as alleged.[29]

**2. The Alleged Violations of 8(a)(3) and (1)**

a) Guiding Principles

The Board stated in *Wright Line*:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of

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[26] While testifying that the sign was not calculated to thin out union-member applicants, Rose did not deny making this remark. Jones was altogether convincing in any event.

[27] Rose in effect admitted doing this.

[28] Rose's depiction.

[29] *Scotto's IGA*, 249 NLRB 909 (1980). The Board there affirmed the Administrative Law Judge's finding of a violation on facts similar to the present. See also, *Bohemia, Inc.*, 266 NLRB 761 (1983).

Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.[30]

b) Hendrix

I conclude that the General Counsel has made the requisite *prima facie* showing that Respondent's failure to hire Hendrix violated 8(a)(3) and (1).[31] My reasons for this conclusion are:

1. Hendrix quite obviously is a competent journeyman, and his application preceded those of the local-area journeymen who were hired.

2. Respondent apparently has a policy against hiring known union members. The record contains no evidence that any of those hired for the project in question was a member; Rose pointedly extracted information from applicants about their membership and sympathies, presumably as a winnowing tool; and Imdieke's initial response, when asked if Respondent ever hired union members, was, "That's a tough one." Even more revealing, Rose told Jones that the no-applicants sign was "just for the Union's benefit," and he advised Macomber that Respondent "couldn't accept applications from a labor organization,"[32]

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[30] 251 NLRB 1083, 1089 (1980) This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 464 U.S. 393 (1983).

[31] That Hendrix was a paid, fulltime union organizer, intent upon organizing Respondent's employees, is of no moment. *H.B. Zachry Company*, fn. 24, *supra*, at sl. op. (JD)4.

[32] Crediting Macomber's convincing and uncontroverted account.

3. Respondent's resolute antiunionism also is revealed by Rose's telling Hendrix in their early conversations that it was "nonunion and wanted to stay that way"; and by his later saying much the same to Jones.[33]

4. Hendrix gave Respondent cause to believe he would be an aggressive and dedicated organizer. Beyond being paid to organize, he proposed to Imdieke and Rose that Respondent enter into an agreement with the Union, he urged them to use the Union as a manpower source and submitted applications on behalf of a number of members, he picketed and leafleted to protest Respondent's wage and benefit levels, and he candidly told Rose that, if hired, he would organize during nonwork time.

5. Respondent plainly saw Hendrix as an organizational threat. Thus, Rose entered in his log after their first meeting that Hendrix gave him "the impression that" the Union had "targeted [Respondent] for infiltration of union members"; Rose discussed "the union issue" with Imdieke and Johnson after his second conversation with Hendrix, and they decided not to give out applications "until all angles have been checked"; Rose and Johnson had a follow-up conversation dealing with "hiring policies concerning union help, discrimination"; Imdieke conferred with Respondent's labor counsel before answering Hendrix's request for an application; Rose forwarded only Hendrix's application to Imdieke, whereupon Imdieke again conferred with labor counsel; Rose told Casavant, when Casavant submitted his application, that Hendrix had "come by" and Respondent "might be going union";[34] Rose told Hendrix he "wouldn't like" his organizing during nonwork time, were he to be hired; and Rose questioned Brooks whether he knew

[33] Citing *Indian Head Lubricants*, 261 NLRB 12, 18 (1982), the General Counsel argues that Respondent's union animus also is shown by the remarks of Rose's son, Todd. I need not address that in light of abundance of other indicia.

[34] Crediting Casavant's unchallenged testimony.

Hendrix, whom he identified as "our little union buddy," after Hendrix had engaged Brooks in conversation while leafleting at the jobsite.

6. By telling Hendrix on December 30 that, although Respondent was then hiring, his application had not been considered because "it's kind of hard to hire you when you're out there on the other side, picketing,"Rose effectively admitted that Hendrix's protected activities were a factor in his nonhire.[35]

I further conclude that Respondent has failed to overcome the *prima facie* showing. As Respondent states in its brief, incorporating Rose's and Imdieke's testimony, its principal reason "for refusing to hire Hendrix was that neither Rose nor Imdieke took his application seriously. . . since it was submitted pursuant to, and in furtherance of his full-time union employment responsibilities." This is an admission on improper motive.[36] Far from overcoming the *prima facie* case, it bestows conclusivity.[37]

Respondent contends that it had an additional, less basic, reason for not hiring Hendrix--that he had indicated on his application that he was interested only in a foreman's job, and none was available. As earlier noted, Hendrix entered "Journeyman-Foreman Electrician" where the application asked for "Position Desired." Rose never sought clarification from Hendrix about this, however, which he surely would have done, given the equivocal form of the entry, had he an open mind about Hendrix; and the weight of evidence is overwhelming that the application would not have been taken any more seriously had Hendrix written "Journeyman Electrician."

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[35] As I earlier conclude, this remark was unlawful. See text accompanying fn. 25, *supra*.

[36] The record being devoid of evidence that Hendrix applied in bad faith, with no intention of taking a job if offered.

[37] *H.B. Zachry Company*, fn. 24, *supra*, at sl. op. (JD) 4.

c) Haugen

I conclude that the General Counsel also has made a *prima facie* showing that Respondent's failure to hire Haugen violated 8(a)(3) and (1). My reasons for so concluding, in addition to the previously-detailed indicia that Respondent has a policy against hiring known union members and otherwise is ardently antiunion, are:

1. Haugen, like Hendrix, apparently is a competent journeyman.

2. The weight of evidence reveals that Respondent was still seeing journeymen when Haugen applied on December 28, and for at least several days after. Thus, when Haugen first told Rose on the 28th that he is a journeyman, Rose exclaimed, "Oh, great!" and urged Haugen to apply "right away";[38] then, on the 30th, Rose told Hendrix he was "looking for guys"; and Rose informed journeyman Joseph Lesh in early January that he "would be hiring."[39] Additionally, Rose informed the Employment Service on December 27 that he invited the referral of "journeymen and other experienced electricians," leaving that directive undisturbed until January 13; and one of the local-area journeymen hired by Respondent, Casavant, did not receive confirmation of his hire until January 3.[40]

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[38] Crediting Haugen. Rose recalled saying, "Good," and inviting Haugen to come to the site. I do not credit Rose that he told Haugen, after he had filled out an application, that Respondent "didn't need any more journeyman electricians" because he had "made up [his] mind who [he] was going to hire." That testimony was not convincingly rendered, and, as is elsewhere noted, conflicts with the information Rose gave to the Employment Service on December 27, to Hendrix on the 30th, and to Joseph Lesh in early January.

[39] Lesh, uncontroverted, is credited.

[40] Crediting Casavant. Respondent states in its brief that Casavant testified "that he had been offered employment in early December and that he quit his other job in reliance upon that offer." This is not accurate.

3. Rose's asking Haugen if his past employers were unionized was, as previously observed, "a thinly-veiled inquiry into Haugen's union feelings";[41] and, from Haugen's affirmative response, Rose had reason to surmise that he is a member.

I conclude, finally, that Respondent has not overcome the *prima facie* showing. Its defense is based on Rose's testimony that he "had made up [his] mind" before December 14 "who [he] was going to be putting on as a journeyman," and that he had made commitments to the three hired on December 1 (Casavant), December 15 (Gauthier), and December 27 (Jones). That story is fundamentally impeached, however, by the considerable evidence, summarized above, that Rose was still seeking journeymen when Haugen applied on the 28th, and for some days thereafter; by the records of the Employment Service, which disclose that he advised it on December 14 that Respondent "need[ed] journeymen and other experienced electricians"; and by the passage in his affidavit that he "was actually looking for . . . 5 journeymen" when he placed the December 14 order with the Employment Service.

## IV. Conclusions of Law

Respondent violated section 8(a)(3) and (1) by failing to hire Michael C. Hendrix and Allen Haugen, effective January 3, 1989.

Respondent, by its project foreman, Douglas Rose, further violated Section 8(a)(1) as follows:

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Casavant testified, as earlier set forth, that Rose told him in early December that he "probably" could start on January 3 or 4, and that he quit his job on December 23 because he was "tired" of it and "thought [he] had a pretty good chance of getting this job" with Respondent.

[41] As I earlier conclude, this interrogation was unlawful. See text accompanying fn. 22, *supra*.

a) In late November 1988, by asking applicant Jerry Jones if he was "still affiliated with the Union" and how he felt "about working for a nonunion shop."

b) In late November 1988, by telling Jones that Respondent "is nonunion and it intends on staying nonunion."

c) On December 28, 1988, by asking Haugen if his past employers were unionized.

d) On December 30, 1988, by telling Hendrix that he had not "considered" Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing."

e) On January 9, 1989, by asking employee Lafayette (Dean) Brooks if he knew Hendrix, "our little union buddy."

f) In mid-January 1989, by telling Jones that a no-applicants sign was "just for the Union's benefit."

g) On February 7, 1989, by asking Jones if an NLRB agent had called him.

**Recommended**

**ORDER**[42]

Respondent, Willmar Electric Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a) Failing to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

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[42] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b) Interrogating job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

c) Telling job applicants that Respondent is nonunion and intends to stay nonunion.

d) Telling job applicants that it has not considered their applications because of their union activities.

e) Coercively interrogating employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

f) Telling employees that a no-applicants sign is "just for the Union's benefit."

g) Coercively interrogating employees, during the pendency of an unfair-labor-practice charge against Respondent, whether they had been called by an NLRB agent.

h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by the Act.

2. Take this affirmative action, to effectuate the purposes and policies of the Act:

a) Offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for Respondent's unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and make them whole, with interest where appropriate, for any losses of earnings and benefits suffered as a result of that discrimination.[43]

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[43] Backpay shall be computed as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizon*, interest is computed at the "short-term federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

b) Preserve and on request make available to the Board or its agent, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to determine the amount of backpay due under the terms of this Order.

c) Post at its J.C. Penney project in Silverdale, Washington, and at its headquarters in Willmar, Minnesota, copies of the attached notice, which is marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt, and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

d) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order, what steps Respondent has taken to comply with it.

Dated: September 1, 1989

RICHARD J.BOYCE
Administrative Law Judge

[44] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The trial held in Seattle, Washington, on April 6-7, 1989, in which we participated and had a chance to give evidence, resulted in a decision that we have committed unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, and this notice is pursuant to that decision.

Section 7 of the Act gives employees these rights:

To organize themselves;
To form, join or support unions;
To bargain as a group through a representative they choose;
To act together for collective bargaining or other mutual aid or protection;
To refrain from any or all such activity except to the extent the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT fail to hire Michael C. Hendrix, Allen Haugen, or any other statutory employee because of their sympathies or activities on behalf of the International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT interrogate job applicants about their union affiliations, their feelings about working for a nonunion employer, or whether their past employers were unionized.

WE WILL NOT tell job applicants that we are nonunion and intend to stay nonunion.

WE WILL NOT tell job applicants that we have not considered their applications because of their union activities.

WE WILL NOT coercively interrogate employees whether they know certain officials of International Brotherhood of Electrical Workers, Local Union No. 46, or any other labor organization.

WE WILL NOT tell employees that a no-applicants sign is "just for the Union's benefit."

WE WILL NOT coercively interrogate employees, during the pendency of an unfair-labor-practice charge against us, whether they had been contacted by an NLRB agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act.

WE WILL offer Michael C. Hendrix and Allen Haugen full and immediate employment in the positions, or their substantial equivalents, in which they would have been employed, effective January 3, 1989, but for our unlawful discrimination against them, without prejudice to any seniority or other rights or privileges they would have acquired; and WE WILL make them whole, with interest, for any losses of earnings and benefits suffered as a result of that discrimination.

WILLMAR ELECTRIC SERVICE, INC.

_____

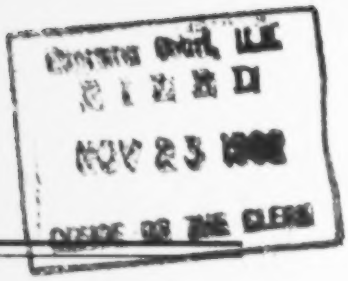
(Employer)

Dated_____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174-1078; telephone: (206) 442-7472.



No. 92-687

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
*Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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Attorneys for Interveners

November 23, 1992

## QUESTIONS PRESENTED

1. Should certiorari be denied as to the question whether a paid union organizer working for an employer he is attempting to organize is an "employee" of that employer, where there is no evidence in this record that the organizer in question would have continued to be paid or employed by his union if Petitioner had hired him?

2. Should certiorari be denied as to the question whether an assumed disloyalty on the part of a union organizer *could* constitute a non-discriminatory reason for refusing to hire him, where Petitioner offered no proof that this was its actual reason for refusing to hire the organizer, and where Petitioner failed to challenge the finding of the National Labor Relations Board that its actual reason was union animus?

3. Should certiorari be denied where the Court of Appeals correctly decided that employers under the National Labor Relations Act may not attempt to maintain work places free from union organizing activity by discriminatorily refusing employment to persons, otherwise qualified, who have been, and may continue to be, paid union organizers?

## LIST OF PARTIES

In addition to the parties whose names appear in the caption of the case in the Petition, Interveners International Brotherhood of Electrical Workers, Local Union No. 46 ("the Union"), and Michael C. Hendrix are also parties to this proceeding.

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*Palby Lingerie, Inc.*, 252 NLRB 176, (1980) ..... 9

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*Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985) . 9

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*Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) .... 17

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No. 92-687

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
*Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### *OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED*

Interveners hereby adopt the statements of Petitioner concerning the opinions below, jurisdiction and statutes involved.

### *STATEMENT OF THE CASE*

Interveners hereby adopt the statement of the case made by Respondent in its Brief in Opposition. Interveners wish to supplement that factual recitation, however, in one respect.

Interveners stress that the uncontroverted testimony of Michael Hendrix before the National Labor Relations Board ("the Board") established that he would not have remained an employee of the Union if Petitioner had hired him. Thus, the main issue on which Petitioner urges this Court to grant certiorari–the issue of dual employment by a union and another employer–is not presented by the facts of this record. Mr. Hendrix testified as follows:

> Q. You would be quitting your position [with the union]?
>
> A. I'd be going into the field to organize actually on the job.
>
> Q. Okay, but retaining your employment by IBEW Local 46?
>
> A. *I would not be employed, no. By the time I went to work for them, I would probably cease getting employment money. I would still retain the title of field organizer.*

J.A. 34 (emphasis added).[1]

> Q. Now I assume from your testimony that field organizing was a full-time position.

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[1] All references to "J.A." are to the Joint Appendix filed with the Court of Appeals in this matter.

A. Well basically, yeah, it's more than full time.

Q. And part of that full-time position is to work for employees–or, excuse me–employers?

A. *If I got hired, I would be. Like I say, the money would stop. My checks would stop from the IBEW and I would be working for–for work produced for the employer, I would be getting paid for what I produced for the employer at that time. They would become my employer at that time.*

Q. Okay. Now you were being paid $21 an hour by–and perhaps still are–by the IBEW. Isn't that correct?

A. Yes, sir.

Q. Would the IBEW in that situation compensate you for any shortfall in your compensation?

A. I don't know.

Q. Did you discuss this with anybody?

A. No.

Q. You assumed that you would be paid at a lower wage rate?

A. I was prepared to take that wage rate.

J.A. 37-38 (emphasis added).

> Q. Okay. What I'm wondering is, you said that obtaining employment was part of your responsibilities or duties as a field organizer. Did I get that wrong?
>
> A. It was part of them. I applied while I was working under employment for Local 46.
>
> Q. Was to go out and seek employment with non-union employers?
>
> A. That's possibly part of the job.
>
> Q. It is. But apparently, or you're not sure whether it's part of the compensated job.
>
> A. *Yeah. Well, like I say, I would have to take a leave of absence from Local 46 while I was working for Willmar Electric. They would cease me on the payroll at that time, I am sure. But I say, like I don't know. I never–I haven't crossed that.*

J.A. 39-39A (emphasis added).

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I. CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST QUESTION URGED BY PETITIONER IS NOT PRESENTED BY THE FACTS OF THIS RECORD.

Petitioner eloquently asserts the importance of the question whether a paid union organizer seeking employment in a work place he intends to organize is an "employee" protected from discrimination in hiring under the National Labor Relations Act ("the Act"). However, Petitioner ignores the fact that this question is not presented by the facts of record.

A. *Petitioner Urges This Court To Decide Whether A Paid Union Organizer Is An "Employee" Within The Meaning Of Section 2(3) Of The National Labor Relations Act. However, The Record Contains No Evidence That Michael Hendrix Would Have Continued To Be Paid Or Employed By The Union If He Had Been Hired By Petitioner.*

Michael Hendrix testified at the hearing in this matter that his employment with the Union would cease, he would take a leave of absence, and he would be taken off the Union's payroll, in the event he was hired by Petitioner. When pressed on cross examination as to whether the Union would reimburse or compensate him in any way, despite his being off the regular payroll, Mr. Hendrix testified that he did not know.

Because the record is so important to the determination whether this is an appropriate vehicle for deciding the question presented, Interveners have quoted at length from the testimony of Michael Hendrix in the Statement of the Case. From this uncontradicted testimony, it is clear there is simply no affirmative evidence Mr. Hendrix would have remained employed or paid by the Union if he had obtained employment as an electrician with Petitioner. Although Mr. Hendrix testified that it was part of his job duties with the Union to *seek* employment with non-union employers, he testified that his employment with the Union would cease once he *obtained* such outside employment. He also informed Petitioner that he would confine his organizing activities to lunch time and after work. J.A. 52-53, 146, 245. The Board correctly summarized the record when it stated:

> Hendrix's uncontroverted testimony is that: he received no specific direction from the Union to seek employment with the Respondent; if hired by the Respondent, he would have to take a leave of absence from employment by the Union; he would limit any organizational activity to personal time at lunch and after work; he would not receive direction from the Union during hours of work for the Respondent; he was willing to take a reduction in pay to work for the Respondent; and he did not know whether the Union would reimburse him for any shortfall in compensation. *In sum, although Hendrix clearly intended to serve the Union's organizational interests as an employee of the Respondent, there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for the Respondent.*

Pet. App. A2 (emphasis added).[2] The asserted problem of "dual employment" by adversary employers, of which Petitioner complains, Pet. 11-13, is simply not present in the facts of record.[3]

By contrast, In each of the four decisions cited by Petitioner as creating a conflict among the circuits, it was clearly established that the organizer continued to be employed by and/or receive money from the union while simultaneously employed by the respondent employers. *Escada (USA) Inc.*, 304 NLRB No. 109, *enforced without opinion*, 970 F.2d 898 (3rd Cir. 1992) (organizer employed by union and paid salary and benefits by union); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989) (applicant for employment would have remained employed and supervised by the union if hired by respondent employer, and would have continued to receive salary and benefits from union);[4] *NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2nd Cir. 1979) (union organizer paid $50 per week by union while working for respondent employer);

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[2] All references to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari in this matter.

[3] As the Court of Appeals noted, this question applies equally to applicants for employment as to employees already hired. "Applicants for employment are considered 'employees' under the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)." Pet. App. A4.

[4] *H.B. Zachry* is distinguishable from the present case for another reason as well. In *H.B. Zachry*, the court expressly excluded from its holding any case in which "a company...has a policy of accepting applicants already fully employed, yet then rejects an applicant because he is fully employed by a union." 886 F.2d at 75.

In the present case, Petitioner hired two electricians knowing that they were employed in their own electrical contracting businesses, and that one of them might leave before the conclusion of Petitioner's job in order to resume his own business. (He ultimately did leave, but was hired back by Petitoner later.) J.A. 147-48, 167-69, 174. None of these facts prevented Petitioner from hiring the two electricians. Only in Mr. Hendrix's case does Petitioner assert that his alleged outside employment prevented him from becoming its employee.

NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421 (6th Cir. 1964) (union organizer paid $15 per week by union to cover organizing expenses while working for respondent employer).

Unlike the cases cited above, the case at bar does not present a proper record on which to decide the question urged by Petitioner, i.e., whether a *paid employee of a union* working for an employer he is trying to organize is an "employee" of that employer under the Act. The Court of Appeals chose to reach this issue by focussing on the fact that *before* Mr. Hendrix would have begun his employment with Petitioner he was employed by the Union, and *after* Petitioner's construction project finished he might again be employed by the Union. However, the Board found that Mr. Hendrix would *not* have remained an employee of the Union *during* the period he was employed by Petitioner. Pet. App. A13. Although the Circuit Court did not overturn this finding, it reached the issue in question by stating vaguely that Mr. Hendrix "plan[ned] to retain some kind of employment affiliation with the union" during the period he would work for Petitioner. Pet. App. A2. The nature of this employment affiliation was characterized by the court as nothing more than "his retention of a vague union title". Pet. App. A4.

Although Interveners agree with the holding of the court below, and have not petitioned for certiorari, Interveners believe it was unnecessary on the present record to reach the issue in question.

Petitioner argues that a union organizer who maintains dual employment for a union and another employer necessarily abandons employment for the other employer. However, the common law definition of dual employment cited by Petitioner (and the Court of Appeals) states that dual employment exists only where a person serves two masters "at one time as to one act." Restatement (Second) of Agency § 226 (1958); Pet. 11-12; Pet. App. A6. In the present case, Mr. Hendrix pledged to confine his organizing activities to the lunch

hour and after work–times that belong to Mr. Hendrix alone and during which Petitioner would have no right to control his activities. Thus, Mr. Hendrix would not have served two masters "at one time as to one act." The question of dual employment simply does not arise here.

Because Mr. Hendrix would not have remained a union employee while employed by Petitioner, and the question of dual employment does not arise, this case is a garden variety union discrimination case under section 8(a)(3), as the Board found. Such a case presents no issues of importance warranting the Supreme Court's exercise of discretionary review.[5]

## II. CERTIORARI SHOULD BE DENIED AS TO PETITIONER'S SECOND ARGUMENT BECAUSE PETITIONER FAILED TO PROVE THE FACTS UNDERLYING THAT ARGUMENT, AND FAILED, IN THE COURT OF APPEALS, TO CHALLENGE THE BOARD'S FINDING TO THE CONTRARY.

This Court should decline to grant certiorari to consider Petitioner's second argument for the same reason the Court of Appeals declined to consider it: Petitioner failed to prove the facts underlying the argument and failed to challenge the Board's finding to the contrary.

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[5] It is likely that another case will arise and provide this Court with an opportunity to resolve the issue in question. The issue has been a frequent subject of litigation both in the Circuit Courts (as evidenced by the five cases that have already arisen on the issue) and at the Board level. See, *e.g.*, *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 811 (1985); *Palby Lingerie, Inc.*, 252 NLRB 176, 182 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Lyndale Mfg. Corp., Inc.*, 238 NLRB 1281, 1283, n. 3 (1978); *Oak Apparel, Inc.*, 218 NLRB 701 (1975); *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), enf'd. mem. 538 F.2d 312 (2nd Cir. 1975). (The Board has consistently held in these cases that a paid union organizer working for another employer *is* an "employee" of that employer within the meaning of Section 2(3).)

A. *In the court below, Petitioner failed to challenge the Board's finding that its motivation for refusing to hire Michael Hendrix was union animus. Petitioner is therefore barred from arguing that a different motivation of which it offered no proof–a fear that Hendrix would be a disloyal employee–could have constituted a non-discriminatory reason for refusing to hire him.*

The Board made two rulings regarding Michael Hendrix. First, that he was an "employee" within the meaning of Section 2(3) of the Act, and, second, that Petitioner's refusal to hire him was motivated by union animus, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. A13.

As to the question of union animus, Petitioner presented evidence at the hearing that even in the absence of Mr. Hendrix's union activities, it would not have hired him because: (1) it did not take his application seriously, and (2) he had written on the application "Journeyman-Foreman Electrician", and no foreman positions were available. The Board found these reasons unproven and insufficient to overcome the General Counsel's showing of union animus under the dual motivation test of *Wright Line*, 251 NLRB 1083, 1089 (1980).[6] Pet. App. A39.

In the Court of Appeals, Petitioner challenged the Board's first ruling, arguing that Mr. Hendrix was not an "employee" within the meaning of the Act. However, Petition-

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[6] In *Wright Line*, *supra*, 251 NLRB at 1089, the Board stated:

> [We] shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

er failed to challenge the Board's second ruling, that its refusal to hire Mr. Hendrix was motivated by union animus under the *Wright Line* test. Pet. App. A2.

Instead, Petitioner argued that a different motivation–one of which it offered no proof in the administrative hearing–could constitute a non-discriminatory reason for denying Mr. Hendrix employment. Petitioner argued that it was entitled to assume that Mr. Hendrix, because he was a union organizer, would be a disloyal employee.

The problem with this argument, as the Court of Appeals pointed out, is that even if we assume such a motivation could be considered non-discriminatory, Petitioner failed to prove that fear of disloyalty was, *in fact*, its motivation for denying Mr. Hendrix employment. Pet. App. A6-A7. Petitioner likewise failed to challenge the Board's finding to the contrary. Pet. App. A2. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" for whether the employer's action was discriminatory. *Teamsters Local 357 v. NLRB, 365 U.S. 667, 675 (1961) (quoting Radio Officers' Union, C.T.U. v. NLRB, 347* U.S. 17, 43 (1954)). "[T]he actual motivation of the company decision-maker, not the objective circumstances that may or may not be known to him at the time, will determine the outcome of a case." *NLRB v. Pfizer, Inc.*, 629 F.2d 1272, 1275 (7th Cir. 1980). A theoretical argument cannot substitute for proof of Petitioner's "real motive" in this case.[7]

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[7] The testimony in this case makes it evident that fear of disloyalty was not, in fact, a concern of Petitioner in selecting its electricians. Petitioner hired two electricians who simultaneously were operating their own–and potentially competing–electrical contracting businesses. J.A. 147-48, 167-69, 174.

Furthermore, Petitioner denied employment to at least eight other electricians whose applications indicated they were union members, despite the fact that none of them were union organizers or employees like Mr. Hendrix. Pet. App. A26-A27, A33-A41. One of them, Allen Haugen, was also the subject of discrimination charges that were upheld by the Board.

In effect, Petitioner seeks a *per se* rule that all paid union organizers may be assumed disloyal, so that an employer need not prove that its actual motivation for refusing to hire the organizer was a fear of disloyalty, as opposed to union animus. There is a vast difference between acts of disloyalty (such as sabotage, disclosure of confidential information, aiding a competitor, or disparaging an employer's product) and union activities (such as soliciting authorization card signatures, campaigning in a representation election, or urging an employer to stop anti-union activities). *See, NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 474-75 (1953); *Texaco Inc. v. NLRB*, 462 F.2d 812, 814 (3rd Cir.), *cert. denied*, 409 U.S. 1008 (1972). An employer's refusal to hire a union organizer may be motivated by a dislike of the latter activities rather than a fear of the former. There can be no *per se* rule as to an employer's motivation.

An assumption that union organizing activity will entail acts of disloyalty would completely undermine the purposes and protections of the National Labor Relations Act. Union organizing is protected activity under Section 7[8] and may not be equated with disloyalty. *See, Jefferson Standard Broad-*

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Pet. App. A40-A41. (Petitioner did not challenge the Board's decision as to Mr. Haugen.) The fact that all other union members who applied were denied employment indicates that union animus, rather than a fear of disloyalty on Mr. Hendrix's part, motivated the denial of employment to Mr. Hendrix.

[8] Section 7 provides, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations..." 29 U.S.C. § 157.

*casting, supra.*[9] A union organizer who takes a job with the underlying purpose of unionizing a work place can loyally serve the employer's interest in producing its goods or services. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941).[10] This is the *legitimate* employer interest that our labor laws protect. They do not protect the kind of interest Petitioner seeks to protect–that of having a work place free of union organizers.

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[9] In *Jefferson Standard Broadcasting*, the employer discharged 10 workers for distributing handbills that made a sharp, public, disparaging attack on the company's product and its business policies. *Jefferson Standard Broadcasting*, 346 U.S. at 471. One of the 10 workers was found to have neither sponsored nor distributed the handbills. This Court emphasized the importance of distinguishing between protected union activity and acts of disloyalty, as follows:

> The courts have refused to reinstate employees discharged for "cause" consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty.

*Jefferson Standard Broadcasting, supra*, 346 U.S. at 474-475.

[10] *Phelps Dodge* held that an applicant for employment may not be denied a job because of his union affiliation. This Court stated that under the National Labor Relations Act, the vital national purpose of eliminating obstructions to the free flow of commerce

> was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association'. Sec. 1. Only thus could workers ensure themselves economic standards consonant with national well-being. *Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.*

*Phelps Dodge*, 313 U.S. at 182 (emphasis added).

Petitioner's legitimate interest in producing its goods and services is protected by its right to discharge or refuse to hire an individual who has sabotaged operations, disparaged a product, aided a competitor, or disclosed confidential information.[11] Absent proof that an employer acted out of a well-founded fear that a particular union organizer, if hired, would engage in such acts of disloyalty, it cannot be assumed that this was the employer's motivation.

Having failed to offer proof of the motivation for which it now contends, and having failed to challenge the Board's finding to the contrary, Petitioner may not now obtain certiorari on this issue. Petitioner has waived the issue. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992) (failure to contest Board findings in the court of appeals constitutes waiver).

## III. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THAT A PAID UNION ORGANIZER EMPLOYED IN A WORK PLACE HE IS ATTEMPTING TO ORGANIZE IS AN "EMPLOYEE" PROTECTED FROM DISCRIMINATION IN THAT WORK PLACE UNDER THE NATIONAL LABOR RELATIONS ACT.

A final reason for this Court to deny certiorari is that the Court of Appeals fully considered and correctly decided the issue in question, though Interveners believe it was unnecessary to reach the issue.

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[11] An individual may also be discharged for violating a plant rule, such as a non-discriminatory rule against solicitation during work hours.

A. *A Paid Union Organizer Working For An Employer And Attempting To Organize That Employer's Work Force Does Not, Merely By His Status As A Union Employee, "Abandon" Employment For The Employer.*

The court below correctly held that

> [u]nder common law principles "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency § 226 (1958); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (recognizing that under the common law a servant can have two masters in a variety of relations); *Dellums v. Powell*, 566 F.2d 216, 222 n. 22 (D.C. Cir. 1977) (same). Until such time as an employee "abandons" the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act.

Pet. App. A6.

Petitioner argues that the adversity of interest that exists between a union organizer and a non-union employer necessarily results in the organizer "abandoning" work for that employer, even if he is performing his job duties in an excellent manner and confining his organizing activity to non-working hours. Petitioner argues in a similar vein that an

intent to serve the union necessarily excludes an intent to serve the other employer.[12]

As this Court has recognized, the "plain meaning" of the term "employee" in Section 2(3) extends to the broad class of individuals "who work for another for hire." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 166 (1971). If hired by Petitioner, Mr. Hendrix would have performed labor as an employee, at Petitioner's workplace, alongside Petitioner's other employees, under Petitioner's direction and control, for Petitioner's profit, and in return for wages from Petitioner. Given these facts, it would simply rob the term "employee" of its plain meaning to conclude that Mr. Hendrix is other than an "employee."

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[12] Interestingly, Petitioner assumes in its discussion that the outside employer will always be a *non-union* employer. Whatever force its overall argument might have in that situation–and Interveners concede none–it has, if possible, even less force where the employer is already unionized and the organizer is from a rival union. There, the only conflict of interest that exists is between the incumbent union and the rival union. Yet under Petitioner's rule, the rival union organizer would not be considered an "employee" of the employer under the same misguided "conflict of interest" theory that Petitioner has devised for the non-union situation.

Petitioner's misguided theory would also be applicable to the case where an employer discharges a worker for protected union activity *without knowing* that the worker is actually a paid union organizer. This is exactly what occurred in *Escada (USA), Inc., supra*, 304 NLRB No. 109, *enf'd w/o opinion*, 970 F.2d 898 (3rd Cir. 1992). Under Petitioner's theory, regardless of how unlawful an employer's actions and motives might be, the employer is immunized from liability under the Act by the fortuity of the worker's status as a paid organizer. This would allow employers to circumvent the principle expressed *infra*, p. 12 that it is the "true purpose" or "real motive" of an employer that determines whether its hiring or firing decision is discriminatory.

Section 2(3) contains seven specific exclusions from its definition of "employee."[13] Under the well-established canon of statutory construction *expressio unius est exclusio alterius*, the enumeration of exclusions in the definition of "employee" indicates that it includes all cases not specifically excluded. This Court applied precisely this analysis when confronted with the issue of whether undocumented aliens should be considered "employees" within the meaning of Section 2(3), reasoning: "Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

As a matter of policy, Petitioner's argument turns our national labor policy on its head. Our labor laws presume and protect precisely the kind of adversity of interest that Petitioner would eliminate. A union organizer's goal to organize the work force is in no way inimical to an employer's interest in producing its products or services. *See, Jefferson Standard Broadcasting, supra*, 346 U.S. at 474-75; *Phelps Dodge, supra*, 313 U.S. at 182. It is this legitimate interest of employers

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[13] Section 2(3), set forth in its entirety, provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3).

that our labor laws protect–not an employer's interest in keeping union organizers out of its work force.

Petitioner's argument proves too much. It is equally applicable to volunteer union organizers as to paid union organizers. The same adversity and "conflict of interest" may exist between the employer's desire to avoid unionization and the organizer's desire to foster it. Petitioner alleges no other conflict. Surely Petitioner would not argue that a volunteer union organizer in its work force is not its "employee" and may be discharged for union activities without regard to the prohibitions of Section 8(a)(3) of the Act.

*B. The Lechmere And Babcock Decisions, Which Protect Employer Private Property Against Entry By Non-employees, Do Not Permit Employers To Discriminate In Hiring As A Way To Ensure That Certain Persons Never Become Employees And Never Gain Access To Their Property.*

This Court's decisions protecting employer private property rights in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) do not, of course, override the statutory prohibitions against anti-union interference and discrimination contained in Sections 8(a)(1) and (3) of the Act. On the contrary, *Lechmere* and *Babcock* expressly ensure protection of those statutory rights: an employer may not ban non-employee *union* solicitors unless it also bans non-employee solicitors of *all* types from its property. To do otherwise would constitute discrimination.

Petitioner attempts to turn *Lechmere* and *Babcock* into judicial overrides of the statutory prohibition against discrimination. Petitioner argues that forcing employers to hire, or continue to employ, otherwise-qualified union organizers, would render ineffective the protection offered to em-

ployers by *Lechmere* and *Babcock*. However, those decisions in no way license employers to discriminate in *hiring* as a way to ensure that certain persons never *become* employees and never gain access to their property. (Nor do they allow employers to discriminate in *firing* in order to ensure that certain persons do not *remain* their employees and continue to have access to their property.) Unfortunately for Petitioner, the requirements of Section 8(a)(3) do impinge somewhat on its desire to exercise the degree of control over its private property necessary to exclude all union "infiltration". Pet. App. A19. To insulate itself from union "infiltration" while remaining within the precepts expressed in *Lechmere* and *Babcock*, an employer would have to take the absurd step of denying employment to *all* non-employees, not just to non-employees who are union organizers. Only by taking this step could Petitioner exclude union organizers from its work force without discriminating against them in violation of the Act.[14]

*Lechmere* and *Babcock* divide the class of all persons into only two groups: "employees" and "non-employees". This Court has determined that applicants for employment, such as Mr. Hendrix, are "employees" under the act entitled to protection against discrimination. *Phelps Dodge, supra*, 313 U.S. 177. *See also, Elastic Stop Nut Div. of Harvard Ind. v. NLRB*, 921 F.2d 1275, 1280-81 (D.C. Cir. 1990); *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817, 821 (2nd Cir. 1975). While it can be argued that Petitioner may lawfully prevent Mr. Hendrix from soliciting on its property until he is actually hired, as an applicant for employment, Mr. Hendrix is in a

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[14] In the Petition, Petitioner makes an assertion of fact having no support in the record or elsewhere. Petitioner states: "Taking the license granted by the Board to its fullest extent, unions are presently enlisting large numbers of employee/agents to infiltrate the workforces of targeted employer". Pet. 20. Interveners ask that this statement in the Petition be stricken.

protected class; Petitioner may not *permanently* relegate him to the class of non-employees for the purpose of excluding him forever from its property.

Once again, Petitioner's argument proves too much. The argument that an employer has the right to exclude union organizers from its property by refusing to hire them is equally applicable to volunteer as to paid union organizers. Nothing in *Lechmere* or *Babcock* turns on whether the solicitors in question are employed by the union or are merely volunteers. There is no greater impact on Petitioner's property rights either way.[15]

C. *The Fact That An Employee, Such As A Paid Union Organizer, May Be Ineligible To Vote If A Representation Election Is Ever Held, Does Not Mean That He May Be Denied Employment In The First Instance.*

Eligibility to vote in a representation election is the *only* issue raised by Petitioner where an organizer's paid versus unpaid status may matter at all. However, the determination that a paid organizer is an "employee" does not establish that the organizer is necessarily eligible to vote. As this Court has stated, the Board may "exclude from bargaining units persons who are statutory 'employees' otherwise protected by the Act." *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 498 (1985).

The right to vote and the right to employment without discrimination are two different rights. The court below observed:

> Hendrix's qualification as an "employee" is not the same as eligibility to vote; he could be included in a

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[15] The Court of Appeals made the same point: "That Hendrix's employment would give him a better perch from which to propagandize is true, just as it would be true for any union zealot who got a job with Willmar." Pet. App. A7.

> bargaining unit only if found to share the necessary community of interest with other workers. See, e.g., *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985) (employees related to owner/managers not permitted to vote). To the extent that Willmar's arguments have force, they can be raised at that stage.

Pet. App. A7.

Nothing in the Act allows employers to deny a person employment merely because someday, if a union representation election is held, that person might be found ineligible to vote. The Court of Appeals correctly held that Petitioner cannot discriminate against Mr. Hendrix on this ground.

## CONCLUSION

For the foregoing reasons, Interveners pray that the Court deny the writ of certiorari.

Respectfully submitted

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EDITOR'S NOTE

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No. 92-687

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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WILLMAR ELECTRIC SERVICE, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

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## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that a paid union organizer applying for a job with an employer he intends to organize is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act and thus protected against discrimination by that employer because of his union activity and affiliation.

2. Whether the Board's finding that petitioner violated the Act by refusing to hire union organizer Michael Hendrix because of his union activities is supported by substantial evidence.

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 968 F.2d 1327. The decision and order of the National Labor Relations Board (Pet. App. A9-A14), including the recommended order of the administrative law judge (Pet. App. A15-A47), is reported at 303 N.L.R.B. No. 33.

### JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a multi-state electrical contractor headquartered in Willmar, Minnesota. In the summer of 1988, petitioner received an electrical subcontract for a J.C. Penney store in a mall in Silverdale, Washington. Pet. App. A10, A17. Michael Hendrix is a journeyman electrician. On June 23, 1988, Hendrix became a full-time field organizer for the International Brotherhood of Electrical Workers, Local Union No. 46 (the Union). *Id.* at A10, A18. Shortly thereafter, Hendrix contacted petitioner's operations manager, Timothy Imdieke, and asked whether petitioner would enter into a labor agreement with the Union for the Silverdale project. Hendrix sent Imdieke a copy of the Union's standard agreement. On July 25, Imdieke informed Hendrix that petitioner was not interested in signing an agreement, but might be interested in hiring some of the Union's people. *Id.* at A18.

On August 30, Hendrix went to the Silverdale site and introduced himself to Project Foreman Douglas Rose. Hendrix asked about job prospects and whether petitioner might sign an agreement with the Union. Pet. App. A18-A19. Rose responded that "things were really slow." *Id.* at A19. Following that conversation, Rose wrote in his job log for that date that Hendrix had given him the impression that the Union had "targeted [petitioner] for the infiltration of Union members." *Ibid.* Thereafter, Hendrix and Rose had several conversations in which Hendrix continued to ask about jobs. Rose advised Hendrix that petitioner would get its applicants through the state employ-

ment service and that it was "nonunion and wanted to stay that way."[1] *Id.* at A20.

On October 14, Hendrix delivered his own and another electrician's completed job applications to Rose. Pet. App. A20. Hendrix's application listed his present employer as the Union. His stated reason for leaving was to "work in the field." Pet. App. A3. According to Hendrix's credited testimony, it was normal for field organizers to seek employment. While union officials knew about his application for employment with petitioner, he testified that he had received no directions from the Union to seek that employment. Hendrix further testified that he would have to take a leave of absence from employment with the Union if hired by petitioner, while retaining his title as field organizer; that he would be paid by petitioner for the work performed for it; and that, while his wages with petitioner would be less than he was currently receiving from the Union, he did not know whether the Union would compensate him for any shortfall in compensation. *Id.* at A10-A11; C.A. App. 34, 37-38, 39-39A.

Between November 30 and December 15, 1988, Hendrix and two others picketed the Silverdale project with signs stating that petitioner was paying substandard wages. They also distributed leaflets at the site. Pet. App. A22-A23.

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[1] Similarly, in interviewing electrician Jerry Jones for a job at Silverdale, Rose asked about his union affiliation. When Jones replied that he was discontented with the Union and was no longer a member, Rose stated that Jones did not have to worry because petitioner was "nonunion and it intends on staying nonunion." Pet. App. A22.

On December 30, Hendrix called Rose to ask whether he was hiring and whether he had considered Hendrix's application. Rose responded that petitioner was hiring, but had not considered Hendrix's application because "it's kind of hard to hire you when you're out there on the other side, picketing." Pet. App. A25. Hendrix replied that he was no longer picketing, he was experienced in the type of work that petitioner was doing, he would do a good job, and he wanted Rose to consider his application seriously. Hendrix also indicated that, if hired, he would perform his duties as an electrician during working time and would engage in organizing activities during the lunch hour and after work. *Id.* at A25-A26. Petitioner never offered Hendrix a job.[2]

2. The Board, in agreement with the administrative law judge (ALJ), concluded that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by refusing to hire Hendrix.[3]

The Board reaffirmed its position in *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886

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[2] Petitioner also rejected the employment application of union electrician Allen Haugen after interviewing him and learning that he had previously worked for unionized employers. Pet. App. A23-A25.

[3] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right "to form, join, or assist labor organizations." 29 U.S.C. 158(a)(1), 157. Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." 29 U.S.C. 158(a)(3).

F.2d 70 (4th Cir. 1989), that "individuals who are full-time paid union organizers while applying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status."[4] Pet. App. A11-A12. While stating that an employer may rely on a nondiscriminatory policy in refusing to hire an organizer, such as a policy against hiring those who seek short-term work or who work for other employers, the Board agreed with the ALJ that petitioner "did not prove that it refused to hire Hendrix pursuant to any such nondiscriminatory policy." *Id.* at A12 n.2.

The Board affirmed the ALJ's finding that petitioner had refused to hire Hendrix because of Hendrix's protected union activities. The ALJ's finding relied on, *inter alia*, petitioner's "policy

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[4] Section 2(3) of the Act, 29 U.S.C. 152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

against hiring known union members," Pet. App. A37, its intent to stay "nonunion," and its perception of Hendrix "as an organizational threat." *Id.* at A38. The ALJ further found that petitioner had not sustained its *Wright Line* burden of showing that it would have refused to hire Hendrix even in the absence of his union activities.[5] The testimony of petitioner's agents that they refused to take Hendrix's "application seriously" because he had applied as a result of "his full-time union employment responsibilities" constituted "an admission o[f] improper motive." *Id.* at A39.[6]

The Board ordered petitioner, *inter alia*, to offer Hendrix immediate employment and to reimburse him for lost earnings and benefits. Pet. App. A14, A42.[7]

3. The court of appeals rejected petitioner's contention that a paid union organizer is not an "employee" covered by Section 2(3) of the Act, and it enforced the Board's order. Pet. App. A1-A8. The

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[5] Under the Board's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), once the Board's General Counsel has shown that an anti-union motive animated the employment decision, the employer can defend by showing it would have made the same decision in any case. See also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding Board's *Wright Line* approach).

[6] The ALJ found no substance to petitioner's assertion that it thought Hendrix was only interested in a foreman's position. Pet. App. A39.

[7] The Board also affirmed other uncontested findings of the ALJ with respect to other violations the Act, Pet. App. A9, A41-A42, which petitioner did not challenge in the court of appeals, *id.* at A3, and does not challenge here.

court first noted that applicants for employment are employees within the meaning of the Act. Pet. App. A4, citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). It further noted that, "despite Hendrix's employment ties to the union, there is no real claim that Hendrix's hoped-for job with Willmar would have been a sham," and that, "[i]n most respects, Hendrix would have been indistinguishable from a zealous volunteer who resolved to use his free time during lunch and after work to advance the union's interests." Pet. App. A4. The court acknowledged, however, that Hendrix's "then-current job with the union," "his retention of a vague union title," and "his prospect of reemployment by the union might have had various subtle (or perhaps not so subtle) effects on his conduct as a Willmar worker." *Ibid.* Accordingly, the court stated that "[t]he nub of the controversy is whether Hendrix's employment ties to the union disqualified him from being a Willmar employee enjoying full protection of the Act." *Ibid.*

Applying the analysis of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court concluded that Congress had not "clearly resolved the issue" of whether the term "employee" as used in the Act encompasses paid union organizers. Pet. App. A4. The court explained that, "[a]s moonlighting is widespread, it is plain that the word 'employee' cannot exclude concurrent employment generally. Once that (obvious) step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history." *Id.* at A4-

A5. The court found no such evidence, however. On the contrary, it found that "closely related legislation, the Labor Management Relations Act, manifests a congressional assumption that an employee may be employed by a union and another entity." *Id.* at A5.[8]

The court also noted that this Court had "recently stated a presumption that a statutory use of the term 'employee' should be taken to have its common law meaning unless Congress 'clearly indicates otherwise.'" Pet. App. A5, quoting *Nationwide Mutual Insurance Co.* v. *Darden*, 112 S. Ct. 1344, 1349 (1992). Under common law principles, the court found, a person can serve two masters, so long as "service to one does not involve abandonment of the service to the other." *Id.* at A6, quoting Restatement (Second) of Agency § 226 (1958). The court added that, "[u]ntil such time as an employee 'abandons' the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Ibid.*

The court then rejected petitioner's arguments against applying Section 2(3) of the Act to paid union organizers. First, in response to petitioner's contention that the organizer's "employment relation to the union would subject [the employer] to intolerable risks of disloyalty," Pet. App. A6, the court noted that nothing in the Act prevents an employer from disci-

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[8] The court referred (Pet. App. A5) to Section 302 of the Labor-Management Relations Act (LMRA), which, although it generally prohibits payments from an employer to an employee of a union, excepts from that ban payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1).

plining or discharging an employee for disloyalty. The court emphasized, however, that if the disloyal employee "is also a union member and proves that the employer fired him for organizing activity, the employer may not evade the *Wright Line* rule by saying that [disloyal persons] are not 'employees'; it must prove that it would have fired [them] even if [they] hadn't been engaged in union-related activities." *Id.* at A7.[9]

Second, the court rejected petitioner's claim that the risk that an organizer might participate in a vote on union representation constituted "a reason to deny [him] the protection of the NLRA at the hiring stage." Pet. App. A7. The court observed that even if the organizer qualified as an "employee" and was hired, he may not be eligible to vote; "he could be included in a bargaining unit only if found to share the necessary community of interest with other workers." *Ibid.*

Third, the court saw no conflict between according "employee" status to a paid organizer who applied for a job and the principle that nonemployee organizers have only limited rights of access to employer property for organizational purposes. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). The court acknowledged that the organizer's "employment would give him a better perch from which to propagandize," but pointed out that the same "would be true for any

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[9] Earlier in its opinion, the court noted that petitioner had not sought to defend its refusal to hire Hendrix—which the Board found was motivated by his union activities—under the *Wright Line* rule. Pet. App. A2; see also note 5, *supra*.

union zealot who got a job with [the employer]." Pet. App. A7.

Accordingly, the court held that "the NLRB could reasonably determine that Hendrix or anyone else who is employed simultaneously by a union and a company is an 'employee' under § 2(3) of the Act." Pet. App. A8. The court left "to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-union) employer can reject or dismiss the union employee on that ground." *Ibid.*

## ARGUMENT

The court of appeals correctly upheld the Board's longstanding rule that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), and is therefore protected against discrimination because of his union activities and affiliation. Because that principle has been rejected by other courts, however, and because the question is a recurring one in the administration of the Act, we do not oppose this Court's review of that issue.[10]

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[10] The third question presented by the petition is subsumed within the issue of whether a paid union organizer is a statutory "employee"; it simply recasts that issue in terms of whether the treatment of a paid union organizer as an employee (who is therefore protected against discrimination by the employer) is consistent with the "policies underlying the Act." Pet. i. The second question presented, however, raises a distinct issue: whether the perceived risks that a paid union organizer would be disloyal to the employer may justify the employer's rejection of such a person's job application on that ground under Section 8(a)(3) and (1) of the Act. The court of appeals correctly held, Pet. App. A8, that this case does not

1. Petitioner contends (Pet. 11-16, 19-21) that the court of appeals erred in upholding the Board's rule that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). That contention is incorrect.

As this Court has often explained, Congress gave the Board the "primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see, *e.g.*, *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). When the Act does not speak directly to an issue, the Court accords "considerable deference" to the Board's interpretation and will uphold it if it is "rational and consistent with the Act." *Curtin Matheson*, 494 U.S. at 786-787; *NLRB* v. *Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those principles, the court of appeals correctly upheld the Board's rule in this case.

a. The statute does not specifically address the application of the Act to paid union organizers who apply for work with an employer, while retaining an affiliation with the union and intending to engage in organizational activity. The definition of "employee" broadly includes "any employee," 29 U.S.C. 152(3), subject to six specific exclusions, see note 4, *supra*, and there is no express exclusion for paid union

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present that issue, see pp. 20-21, *infra*. We therefore do not believe that review should be granted on the second question presented.

organizers who apply for jobs with other employers.[11] This Court has indicated that common law principles inform the interpretation of the term "employee" unless Congress "clearly indicates otherwise." *Nationwide Mutual Insurance Co.* v. *Darden*, 112 S. Ct. 1344, 1349 (1992) (construing ERISA; referring to other statutes, including the National Labor Relations Act). The common law, however, does not impose a per se prohibition against dual employment. As the court of appeals noted, "[u]nder common law principles, '[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.' " Pet. App. A6, quoting Restatement (Second) of Agency § 226 (1958), and citing *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 324 (1974). Nothing in the text of the Act, therefore, excludes paid union organizers applying for a job from the class of "employees."

b. The Board has determined, as an exercise of its authority to interpret the Act's provisions, that paid union organizers do come within the scope of the term "employee" under the Act. That position is of long duration, see *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975), and has been adhered to consistently. In two

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[11] See *Sure Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984) (the "breadth of § 2(3)'s definition is striking; the Act squarely applies to 'any employee.' The only limitations are specific exemptions" in the statute). It is well established that an applicant for work is considered to be an "employee" under the Act, see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), and is therefore entitled to the protection of the antidiscrimination provisions of the Act.

recent decisions, the Board thoroughly reexamined the issue and reaffirmed its view that the Section 2(3) definition of "employee" covers paid union organizers. *Sunland Construction Co.*, 309 N.L.R.B. No. 180 (Dec. 16, 1992), pet. for review pending *sub nom. International Bhd. of Boilermakers* v. *NLRB*, No. 92-1667 (D.C. Cir., filed Dec. 30, 1992); *Town & Country Electric, Inc.*, 309 N.L.R.B. No. 181 (Dec. 16, 1992), pet. for review pending, No. 92-3911 (8th Cir., filed Dec. 23, 1992).

As the Board explained in *Sunland*, affording the Act's protection to paid union organizers furthers the policies of the Act. "The right to organize is at the core of the purpose for which the statute was enacted." *Sunland*, slip op. 12; see *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991). A flat rule that an employer may reject an applicant based on its hostility to that person's desire to organize the workforce is antithetical to that core purpose. *Sunland*, slip op. 12.

The Board added that protecting paid union organizers against discrimination based on their union activity does not interfere with any legitimate management right. *Sunland*, slip op. 12, citing *Phelps Dodge*, 313 U.S. at 182. The Board noted that the employer may prohibit any employee, including paid organizers, from engaging in union activity during working time, but "[o]utside work time, * * * the organizer—like other workers—is free to solicit for the union." *Id.* at 12-13, citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). The Board also rejected the argument that its position could lead to "unions packing bargaining units with their paid

functionaries." *Sunland*, slip op. 13. Under Board policy, "employee status is not synonymous with voter eligibility," and paid union organizers are excluded from voting where they are "temporary employees" or they do not share a community of interests with fellow employees. *Ibid.* The Board also reiterated that "employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied." *Id.* at 13 n.33.

The Board further rejected the claim that according employee status to paid union organizers is incompatible with "the adversary relationship between employer and union." *Sunland*, slip op. 13. That argument assumes that "paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests." *Id.* at 14. The Board explained, however, that:

> The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.

*Ibid.* The Board emphasized that paid union organizers would be subject to the same disciplinary rules as any other employee, and concluded that, absent objective evidence, there was no reason for inferring that, "if hired, paid union organizers will engage in

activities inimical to the employer's operations." *Id.* at 15.[12]

c. In light of its careful weighing of the labor-relations interests involved, the Board's determination that paid union organizers are covered by Section 2(3) is certainly a rational one. It is also consistent with the provisions of the Act. Contrary to petitioner's contention (Pet. 14-15), the Board's rule in this area does not conflict with *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992). As the Board noted in *Sunland*, those cases "address the lawful restrictions that employers can place on nonemployees" with respect to access to private property; they do not "interpret Section 2(3)" or suggest that property rights can be used to justify invasion of otherwise-protected activity by employees. *Sunland*, slip op. 14. The court of appeals reached the same conclusion. Pet. App. A7.

In sum, the court correctly deferred to the Board's rule that paid union organizers are Section 2(3) employees. Two other circuits have upheld the Board's interpretation of the Act. *Escada (USA)*,

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[12] The Board in *Sunland* went on to consider whether the employer's refusal to hire an organizer who applied for work during a strike of the employer by his union violated Section 8(a)(3) and (1) of the Act. The Board held that, in the strike setting, the refusal to hire was not unlawful discrimination. Slip op. 16-17. *Sunland* thus illustrates that the Board's approach permits room for legitimate employer interests to prevail against a discrimination claim by an union organizer who applies for a job; petitioner's approach, in contrast, would resolve each and every case by denying the organizer protection.

*Inc.* v. *NLRB*, 970 F.2d 898 (3d Cir. 1992), enforcing mem. 304 N.L.R.B. No. 109 (Aug. 27, 1992); *NLRB* v. *Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (rejecting the claim that " 'a paid union infiltrator' is not a *bona fide* employee under the Act," but denying enforcement on substantial evidence grounds).

2. Petitioner contends (Pet. 8-11) that the court of appeals' decision conflicts with *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70 (4th Cir. 1989), and *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). Although those cases are factually distinguishable from this one, we agree that the decisions rest on irreconcilable principles, and create a conflict in this field that warrants this Court's review.

a. In *Zachry*, a paid union organizer applied for work as a welder while intending to remain on the union payroll and receive other benefits from the union. The employer refused to hire him "because he was a union organizer," 886 F.2d at 72, and because he was seeking employment in order to organize the plant. The Board concluded that the employer had committed an unfair labor practice, but the Fourth Circuit denied enforcement. In rejecting "the reasoning of *Oak Apparel*[, 218 N.L.R.B. 701 (1975)] and its progeny," *id.* at 75, the court of appeals concluded that a paid union organizer could not be considered a bona fide "employee" for purposes of the Act because "[a]n employee is a person who while on the job works under the direction of a single employer," and a paid union organizer in effect works "for two different employers at the same time and for the same working hours." *Id.* at 73. *Zachry* also declared that to give paid union organizers employee protection under the

Act would require the employer to subsidize and permit use of its property to further a union's organizational efforts, contrary to *Babcock & Wilcox*, *supra*. 886 F.2d at 74-75.

This case, of course, involves different facts than *Zachry*.[13] Indeed, the Board's opinion suggested that those distinctions might have made a difference under *Zachry*.[14] The court of appeals, however, in enforcing the Board's order, put no weight on those distinctions. Rather, the D.C. Circuit stated that even if petitioner had "made out so powerful a case of

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[13] In *Zachry*, the Fourth Circuit stressed that the applicant intended to remain "in the concurrent employment of another employer," *viz.*, the union, and stated that its holding was a "circumscribed" one, applicable to the situation in which the "job applicant [would be] simultaneously paid and supervised by another employer." 886 F.2d at 75. Here, Hendrix would have taken a leave of absence from the Union (while retaining the position of "field organizer"); would not have been directed by the Union during his working hours with petitioner; and would not necessarily have resumed employment with the Union at the conclusion of the organizing campaign. Pet. App. A11, A13.

[14] The Board stated that it had reviewed *Zachry* and determined to adhere to the position that paid union organizers were "employees," but it also noted "this case is factually distinguishable from *Zachry* on points critical to the Fourth Circuit's determination that the paid union organizer there should be excluded from the statutory definition of employee." Pet. App. A12. The Board explained that "there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for [petitioner]," and the facts therefore did not raise the "same concerns about divided employment loyalties and interests which underlay the Fourth Circuit's conclusion in *Zachry*." Pet. App. A13.

[Hendrix's] likely disloyalty" that the Board would have been required to uphold a discharge for *that* reason, Pet. App. A6, it would not have deprived Hendrix of "employee" status under Section 2(3). Pet. App. A7.

The D.C. Circuit's disagreement with *Zachry* is evident at every stage of analysis. While *Zachry* stated that "the term 'employee' contemplates an employee working under the direction of a single employer," 886 F.2d at 73, the D.C. Circuit concluded the term "employer" can embrace dual employment. Pet. App. A6. And, whereas *Zachry* believed that extending "employee" status to an organizer would conflict with *Babcock & Wilcox*, 886 F.2d at 74, the D.C. Circuit saw "no conflict" between *Babcock & Wilcox* and this case. Pet. App. A7. Finally, *Zachry* expressed concern that a paid union organizer's vote might improperly tip the balance in favor of union representation, 886 F.2d at 74-75, but the D.C. Circuit recognized that the Board can address that concern in defining the bargaining unit; it is not a basis to deny coverage of the Act "at the hiring stage." Pet. App. A7. Accordingly, the analysis in *Zachry* cannot be reconciled with the approach of the Board and the rationale of the D.C. Circuit in this case.

b. In *Elias Brothers*, a union organizer was found to have been employed by the union and to have sought employment as a waitress for the purpose of organizing the employees; during her employment, the waitress received $15 per week from the union. 327 F.2d at 423, 427. The Sixth Circuit stated that, on those facts, the organizer "was not a bona fide employee within the intent of § 2(3) of the Act" and

was therefore not entitled to protection against anti-union discrimination in firing decisions. 327 F.2d at 427.[15] The differences between Hendrix's situation and the organizer in *Elias Brothers* are differences of degree rather than kind; both organizers retained (or would have retained) affiliation with their unions, and both sought the jobs because of their desire to engage in organizing the employer's workforce. Under *Elias Brothers*, Hendrix would likely have been denied "employee" status pursuant to the Act.

c. The discord in the circuits on this issue is likely to persist absent this Court's intervention. The Board recently reexamined the issue in light of *Zachry*, and made clear its rejection of that decision. See *Sunland*, slip op. 11, 13-15; *Town & Country*, *supra*. Moreover, while there are factual variations in the decided cases, those variations do not undercut the disagreement in the courts on the underlying question whether paid union organizers qualify as "employees." Because the issue is a recurring one that is important to the administration of the Act, we do not oppose review of the question whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act and thus entitled to the Act's protections.

3. Petitioner contends (Pet. 16-19) that, even if a paid union organizer is an "employee," an employer

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[15] The court of appeals also rested its decision on the ground that the employee had left voluntarily, rather than being discharged. The court concluded that the waitress so lacked credibility that the court was justified in rejecting her testimony and in finding that she had given notice to the employer. 327 F.2d at 427.

may nonetheless, without violating Section 8(a)(3) and (1) of the Act, refuse to employ such an organizer on the ground that his employment would entail too great a risk of disloyalty. In our view, that issue is not presented here.[16]

The court of appeals sustained the Board's finding that petitioner rejected Hendrix's application, not out of concern that he would be a disloyal employee, but simply because it was opposed to a union and union efforts to organize its employees. The court of appeals noted that under the Board's *Wright Line* test, see note 5, *supra*, petitioner could have defended its refusal to hire Hendrix by showing that "it would have rejected him without regard to those aspects of his relation to the union that the Act protects (e.g., membership, protected union activities)," but it failed to do so. Pet. App. A2. The court therefore left "to another day the issue of when employment ties to a union establish such a risk of disloyalty that the (non-

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[16] Petitioner's contention is also incorrect. See *Sunland*, slip op. 17 n.41 ("we would not permit an employer to presume generally that paid organizers will be disloyal employees"). If such a presumption were permissible, the logical next step would be to allow an employer to presume that *any* committed union member would be "disloyal." A presumption "that loyalty to a union is incompatible with an employee's duty to the employer," however, is "at war" with the basic premise underlying the Act. *Id.* at 14. An employer must establish particularized concerns of disloyalty to justify a refusal to hire. "[S]eparable acts of insubordination, disobedience or disloyalty" are not protected activity under the Act. *NLRB* v. *Local 1229, IBEW*, 346 U.S. 464, 475 (1953) (handbills attacking employer's product with no discernible relation to a labor dispute are unprotected).

union) employer can reject or dismiss the union employee on that ground." *Id.* at A8.

This record, therefore, does not raise any issue concerning whether an employer can justify its refusal to hire an organizer because of concerns about disloyalty. The only question presented respecting petitioner's motive for refusing to hire Hendrix is whether substantial evidence supports the Board's finding that Hendrix was rejected solely because of his union activities. That evidentiary issue does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

## CONCLUSION

The government does not oppose review of the question whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Questions (1) and (3), Pet i). As to second question presented, the petition for a writ of certiorari should be denied.

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.,
*Petitioner*,
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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## BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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## INTERESTS OF THE AMICI CURIAE [1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations in the United States. A significant aspect of the Chamber's ac-

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are being filed simultaneously with the Clerk of Court.

tivities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.[2] The Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.[3]

The National Association of Manufacturers of the United States of America ("the NAM") is a voluntary business association of over 12,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. The NAM and these councils provide information and other educational services and publications to employers regarding employer-employee relations and the laws and legislative proposals that pertain to them. Like the Chamber, the NAM actively represents the interests of its member employers in a wide variety of labor and employment matters before the

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[2] The Chamber participated as an *amicus curiae* in oral argument before the National Labor Relations Board in that body's consideration of the same issue presented in this case—whether paid union organizers are protected employees under Section 2(3) of the National Labor Relations Act. *See Town & Country Electric, Inc.*, 309 NLRB No. 181 (1992); *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (1992), both argued March 18, 1992.

[3] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972).

courts,[4] the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

This case raises the important issue of whether an employer violates the National Labor Relations Act ("NLRA" or the "Act") by rejecting the employment application of a full-time paid union organizer who applies for a job with a company for the purpose of organizing that company's employees on behalf of his union. The issue turns on whether such an organizer is an "employee" as defined by the NLRA, 29 U.S.C. § 152(3) (1988). If paid union organizers are "employees" under the NLRA, then they enjoy all of the protections of the Act, and the members of the Chamber and the NAM must treat them as legitimate job applicants and make the decision on whether to hire them without regard to their status as union organizers. On the other hand, if such applicants are not "employees" protected by the NLRA, then employers are free to refuse to hire them.

A resolution of this issue is of vital concern to the Chamber, the NAM, and their members, many of whom are non-unionized companies that are receiving employment applications from paid union organizers whose primary interest in gaining employment is not to work for the companies, but to organize their workforce for the benefit of a union. These employers need to know whether they must consider these paid union organizers as legitimate job applicants or whether they may rightfully refuse to hire these individuals.

Moreover, review by this Court is particularly necessary to resolve a conflict among the circuit courts of appeals on this issue. *Compare Escada, Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (enforcing without opinion

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[4] *See, e.g., General Motors Corp. v. Romein*, 112 S.Ct. 1105 (1992); *Teamsters v. Daniel*, 439 U.S. 551 (1979); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974).

Board's conclusion that paid union organizer is employee under NLRA) *and NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2d Cir. 1979) (holding paid union organizer to be statutory employee) *with H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989) (holding paid union organizer is not statutory employee) *and NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) (same).

## SUMMARY OF THE CASE

Petitioner, Willmar Electric Service, Inc. ("Willmar"), is an electrical contracting company that was awarded a contract in the early summer of 1988 to perform electrical work on a store under construction in Silverdale, Washington. Pet. App. A17.[5] Michael Hendrix is a journeyman electrician who took a leave of absence from an electrical contractor in June of 1988 to become a full-time paid union organizer for Local 46 of the International Brotherhood of Electrical Workers ("IBEW" or "union"). *Id.* at A18.

In late June, Hendrix asked Willmar officials to enter into a collective bargaining agreement with the IBEW for the project and, in July, sent Willmar a draft of one of the union's recently ratified contracts. Willmar responded that it was not interested in signing a contract with the union, but was willing to receive applications from IBEW electricians. *Id.* at A18. Throughout the remainder of the year, and in his capacity as a paid union organizer, Hendrix continued to press Willmar officials to enter into a contract with the IBEW. Willmar continued to respond that it would not enter into such a contract, but would accept applications from IBEW electricians. *Id.* at A10. On October 14, Hendrix hand delivered his completed job application to Willmar's project

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[5] Throughout this brief "Pet. App." will be used to refer to the Petitioner's Appendix and "Pet. Br." will be used to refer to the Petitioner's Brief.

foreman, Douglas Rose.[6] Hendrix's application stated that his present employer was the IBEW. Hendrix told Rose that, if hired, Hendrix intended to continue his organizing efforts on behalf of the IBEW at Willmar.[7] *Id.* at A3.

After submitting his application, Hendrix continued his organizing activities at Willmar. As part of his IBEW duties, Hendrix organized and participated directly in a picket line in front of the Willmar job site.[8] *Id.* at A22-23. On December 30, 1992, Hendrix called Rose to inquire about his job application. Rose admitted that he had not taken Hendrix's application seriously, and that Willmar was not interested in hiring a full-time union organizer. As Rose observed, "it's kind of hard to hire you when you're out there on the other side, picketing." *Id.* at A25.

Hendrix responded by filing unfair labor practice charges with the NLRB against Willmar, claiming that Willmar's refusal to hire him because of his union organizing activities violated Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (3) (1988). *Id.* at A9. The Board found in favor of Hendrix. In doing so, the Board adhered to its view from prior cases that full-time paid union organizers are "employees" protected by the NLRA and that an employer who refused

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[6] Hendrix's application contained two dates: September 28, the date on which he began filling out the employment application, and October 10, the date he completed the application. Pet. App. A21 n.5.

[7] Hendrix later stated that "obtain[ing] employment . . . to carry out . . . field organizing responsibilities" is "normal activity for field organizers." Pet. App. A11. Hendrix claimed that his organizing activities would be limited to his "free time" during lunch and after work. Pet. App. A3, A26.

[8] This picketing was preceded by a letter from Hendrix, signed in his capacity as union field organizer and written on union stationery, warning Willmar that such picketing would commence due to Willmar's allegedly substandard wages. Pet. App. A23.

to hire such an "employee" because of his union position violated the NLRA. *Id.* at A11-12. The D.C. Circuit enforced the Board's decision, declaring the Board's construction of the definition of "employee" to be "reasonable" in light of common law principles of agency and the apparent absence of a clear and contrary congressional indication. *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992).

## REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

As explained by Willmar in its Petition, the D.C. Circuit's construction of the term "employee" as including paid union organizers who must be considered by an employer for employment is in direct conflict with the conclusions reached by both the Fourth and the Sixth Circuits. *See* Pet. Br. 8-13. The *amici* submit that the uncertainty created for employers and unions alike by this split of opinions is, by itself, powerful reason for this Court to grant the Petition.

We will not reiterate Petitioner's other arguments to support grant of the Petition. Rather, the *amici* demonstrate below that the D.C. Circuit's inclusion of paid union operatives in the Act's definition of the term "employee" is contrary to both (1) the plain meaning of the NLRA and (2) to the policies underlying that Act. Accordingly, we respectfully submit that the Court should grant the Petition and issue a writ of certiorari to reverse the decision below.

### I. PAID UNION ORGANIZERS ARE NOT "EMPLOYEES" UNDER THE LANGUAGE OF SECTION 2(3) OF THE ACT.

In approaching the question of whether paid union organizers are protected employees[9] under Section 2(3)

[9] The Board announced its position on the employee status of paid union organizers in a footnote that it candidly described as

of the NLRA, the D.C. Circuit correctly observed that its analysis should begin with the question of whether Congress had clearly resolved the issue so as to prohibit the courts and the Board from concluding that they were "employees." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Having made this observation, however, the court ignored this initial step by inexplicably failing to analyze the terms of the NLRA itself. Instead, the court relied on an analysis of § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186 (1988), and on common law principles of agency, and erroneously concluded that the Board's interpretation of the NLRA definition of "employee" to include paid union organizers was a reasonable one.[10] As we show below, had the court considered the

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dictum in *Sears, Roebuck and Co.*, 170 NLRB 533, 535 n.3 (1968), stating "[a]s long as the employee gives a full day's work to his 'regular' employer, the fact that he renders services in other hours to the Union does not affect his employee status, whether such latter services are paid or not." In *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), *enf'd*, 538 F.2d 312 (2d Cir. 1975) (unpublished opinion), and *Oak Apparel, Inc.*, 218 NLRB 701 (1975), the Board developed this dictum into a definitional imperative, finding paid union organizers to be protected "employees" under Section 2(3) even if they were working for an employer for the express purpose of organizing that employer's employees. The Board has adhered to this interpretation, *see Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985); *Palby Lingerie*, 252 NLRB 176 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879 (1979); *Henlopen Mfg. Co.*, 235 NLRB 183 (1978), *enf. denied on other grounds*, 599 F.2d 26 (2d Cir. 1979); *Anthony Forest Products*, 231 NLRB 976 (1977), and, in light of this Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 717 (1941), has extended it to include paid union organizers who apply for work to organize an employer. *H.B. Zachry Co.*, 289 NLRB 838 (1988) *enf. denied* 886 F.2d 70 (4th Cir. 1989). *See also Town & Country Electric, Inc.*, 309 NLRB No. 181 (1992); *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (1992); *Windemuller Electric, Inc.*, 306 NLRB No. 125 (1992); *Escada (USA), Inc.*, 304 NLRB No. 109 (1991), *enf'd without opinion*, 970 F.2d 898 (3d Cir. 1992).

[10] *Chevron* dictates that, in the absence of a clear resolution of an issue by Congress, the reviewing court should defer to the agency's

terms of the NLRA, it would have discovered that Congress had clearly resolved this issue by expressly excluding paid union organizers from the definition of "employee." 29 U.S.C. § 152(3) (1988).

Section 2 of the NLRA defines, *inter alia*, the terms "employer," "employee" and "labor organization." Each entity is recognized as distinct and apart from the others by the language of the definitions. In Section 2(2) of the Act, the term "employer"

> includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, *or any labor organization (other than when acting as an employer)*, or anyone acting in the capacity of officer or agent of such organization.

29 U.S.C. § 152(2) (1988) (emphasis added).

The definition of "employee" is set out in Section 2(3) and states

> the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . *but shall not include any individual employed* as an agricultural laborer, or in the domestic service

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interpretation of the statute, if it constitutes a reasonable one. *Chevron*, 467 U.S. at 842-43. The D.C. Circuit also observed that under this Court's decision in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), absent a clear congressional indication to the contrary, the term "employee" should be taken to have its common law meaning. As demonstrated in this Section, Congress clearly excluded union organizers from the definition of "employee" by the terms of the NLRA. Even had Congress not done so, we show in Section II, *infra*, that the common law, interpreted in light of the relationship of employers and unions codified in the NLRA, does not support the conclusion that paid union organizers are employees when they seek to organize another employer.

> of any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, *or by any other person who is not an employer as herein defined.*

29 U.S.C. § 152(3) (1988) (emphasis added).[11]

As the foregoing makes clear, the definitions of these terms are interrelated and refer to each other. While the term "employee" is defined broadly, the term expressly excludes anyone who is employed "by any other person who is not an employer" as defined by the Act. Similarly, although the term "employer" is broad, it contains a number of exclusions, including one for a "labor organization." Through these two interrelated exclusions, Congress has spoken: individuals who are paid employees of a labor organization—including paid union organizers—are *not* "employees" under the NLRA.

In Section 2(2), Congress did add a parenthetical phrase stating that a union is an employer when it is "acting as an employer." That phrase, however, confirms the conclusion that a union's agents are not "employees" when dealing with another employer, like Willmar. Indeed, this parenthetical statement was added for the limited purpose of subjecting labor organizations to the strictures of the NLRA in their treatment of their own employees. *See* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934),

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[11] Section 2(5) defines a "labor organization" as

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1988). While the Act defines a labor organization as comprised of employee-members, as this Court has emphasized, a labor organization has an identity distinct from that of its constituents. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 848 (1992).

*reprinted* in 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (stating that "[i]n its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides."). *See also Office Employees Int'l Union, Local 11 v. NLRB*, 353 U.S. 313, 316 (1957) (holding Teamsters to be employer liable for unfair labor practices in interferring with right of its clerical employees to organize themselves). Congress understood that any broader application of "employer" status to labor organizations would "deprive unions of one of their normal functions", namely, organizing *other* employees. S. Rep. No. 573, 74th Cong., 1st Sess. 6 (1934), *reprinted in* 2 Legislative History of the National Labor Relations Act, 1935, 2300, 2305. *See also* S. Rep. No. 1184, 74th Cong., 2d Sess. 4 (1934), *reprinted in* 1 Legislative History of the National Labor Relations Act, 1935, 1099, 1102 (distinguishing between a union's relation with its "clerks, secretaries and the like" and its actions as an advocate of unionization). Thus, Congress drew a sharp distinction between the union in its relationship with its own employees regarding their own wages, hours, and terms and conditions of employment and the union's organizing activities of other employers. The union, in short, was to be an "employer" only in the limited context of its relations with its *own* employees. Paid agents of labor organizations were intended to be statutory "employees" only when dealing with their own employer, the union, *not* when dealing with some other employer.[12]

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[12] The NLRB, in its most recent statement on the "employee" status of paid union organizers, asserted that it was "immaterial" to its analysis whether a union is a statutory employer because the paid union organizer draws his "employee" status from his attempted employment with the targeted employer. *Town & Country Electric, Inc., supra* note 2, 309 NLRB No. 181, slip op. at 18, n.36; *Sunland Construction Co., Inc., supra* note 2, 309 NLRB No. 180, slip op. at 15, n.37. The Board analogized the union organizer to an agricultural or government worker (neither of whom is an "employee" under Section 2(3) of the Act) who seeks work with an

It is clear, in light of these definitions, that Hendrix was not a statutory employee when he sought a job with Willmar to organize its workforce. When a paid union organizer, like Hendrix, applies for work in order to organize an employer, and is paid by his union to do so, he is carrying out duties as a union agent that bring him outside the ambit of protections provided to "employees" under the NLRA. Lacking "employee" status, Hendrix, like any other non-employee, could be rejected or dismissed by any employer without violating the NLRA.[13] In this respect, a paid union organizer like Hendrix is similar to a company supervisor who is also excluded from the definition of "employee" under Section 2(3) of the Act, and who may be discharged because of his union activities or sympathies. *See, e.g., Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

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"employer covered by the NLRA" and thus becomes an "employee" vis-a-vis that new employer. The Board's summary conclusion, however, simply does not take account of the policies underlying the NLRA or of the facts of the cases under consideration. Thus, as a matter of fact, and unlike the typical agricultural or federal employee seeking a second job, a paid union organizer like Hendrix applies for a job with a targeted employer like Willmar in furtherance of his job as a union organizer. *See supra* note 7, and *infra* note 18. Indeed the NLRB, itself, recognized that paid union organizers (unlike agricultural or government employees) can be presumed to owe their primary allegiance to the union. *Sunland, supra*, slip op. at 17, n.41. Furthermore, as discussed in Section II, *infra*, as a matter of NLRA policy, Congress has struck a delicate balance between employers, unions and employees. This balance is destroyed when employees of labor organizations who apply for work in order to further their union's organizational objectives are deemed indistinguishable from any employee who seeks a second job.

[13] *Cf. Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *aff'd on other grounds*, 336 F.2d 738 (D.C. Cir. 1964) (loss of "employee" status under the NLRA means loss of the Act's protection and an employer's motive for discharging those who have forfeited this status—including its otherwise unlawful desire to rid itself of the employees' union—is immaterial).

The D.C. Circuit failed to confront the clear statutory exclusion of paid union operatives from "employee" status by operation of Sections 2(2) and 2(3) of the NLRA. In failing to comprehend the exclusion of labor organizations from the statutory definition of "employer," the circuit court ratified the NLRB's mistaken focus on the otherwise broad definition of "employee" in Section 2(3), and its mistaken conclusion that the employment of such individuals by the union to organize an employer is immaterial to his statutory "employee" status. *See* notes 9 and 12, *supra*, and cases discussed therein. Given that mistaken analysis, the court improperly concluded that an employer who flatly refused to hire a paid union organizer (a protected "employee" in the court's view) violated Section 8(a)(1) and (3) of the NLRA. 29 U.S.C. § 158(a)(1) and (3).

In light of the foregoing, the D.C. Circuit's analysis and conclusions are simply at odds with the language of the NLRA and this Court should grant the petition for a Writ of Certiorari to correct the court's error.

## II. THE D.C. CIRCUIT FAILED TO EXAMINE THE STRUCTURE OF THE NATIONAL LABOR RELATIONS ACT AND ITS ANIMATING POLICIES AND THUS FAILED TO APPREHEND THAT THE BOARD'S INCLUSION OF PAID UNION ORGANIZERS IN THE DEFINITION OF "EMPLOYEE" WAS AN UNREASONABLE INTERPRETATION OF THE ACT.

As demonstrated in Section I, the D.C. Circuit failed to apprehend the express exclusion of paid union agents from the NLRA definition of employee by the terms of the Act itself. Even absent this express language, however, the D.C. Circuit understood that this exclusion could be supported on the "grounds of some implication from the structure of the Act." [14] *Willmar*, 968 F.2d at

[14] This Court has recognized that the failure of Congress to expressly exclude a category of employees from § 2(3) is not, with-

1329. Having made this observation, the D.C. Circuit proceeded to ignore the structure of the NLRA and its policies and thus erroneously concluded that paid union organizers were "employees" under the NLRA. Instead, the court simply concluded that one person could work for both a union and an employer at the same time and that, to the extent that the individual worked for the employer, that person was a protected "employee" as defined by the Act. In support of this conclusion, the court relied upon Section 302(c)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(1), as evidence that Congress had recognized that one could be employed concurrently by both a union and a company.[15] Since the court failed to consider the underlying structure and policies of the NLRA, however, it failed to appreciate the difference between Section 302, which *allows* an employer to employ a union official if it wishes to do so, and the NLRB decision before it which ***required*** the employer to employ the paid union organizer.[16]

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out more, determinative of their status under the Act. *NLRB v. Bell Aerospace*, 416 U.S. 267, 283 n.13 (1974) (holding managers to be excluded from the NLRA definition of "employee").

[15] Section 302 restricts payments that can legally be made to employee representatives. Section 302(c)(1) *excludes* from this restriction

> any money or thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration *or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee . . . of such employer*, as compensation for, or by reason of his service as an employee of such employer.

29 U.S.C. § 186(c)(1) (1988) (emphasis added).

[16] The court's logic in this regard is no more persuasive than that of the Board, rejected by this Court in *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 170-171 (1971), that retirees are "employees" under the NLRA because of their employee status under § 302(c)(5) of the LMRA. 29 U.S.C. § 186(c)(5) (1988). As stated in note 15, *supra*, Section 302 generally pro-

In concluding that paid union organizers were employees under the NLRA, the D.C. Circuit also purported to apply the presumption articulated in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344 (1992), that the term "employee" should be construed according to common law principles absent a clear Congressional indication to the contrary. As *amici* have demonstrated, the D.C. Circuit failed to recognize the clear exclusion of paid union organizers from the definition of "employee" by the operation of Sections 2(2) and 2(3) of the Act. Furthermore, as shown below, the structure of the NLRA and its animating policies indicate that Congress meant to exclude union organizers from the class of persons protected by the Act, a factor which renders the D.C. Circuit's common law analysis irrelevant.

Even a cursory analysis of the structure of the NLRA shows why the D.C. Circuit was wrong in this case. By design, employers, unions, and employees constitute three distinct groups under the NLRA. The major emphasis of the Act is to protect the rights of employees by keeping employee interests distinct from those of employers and of unions. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841, 848 (1992). The paramount employee right under the NLRA

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hibits payments by employers to unions or union officials. Section 302(c)(5) provides an exemption for payments to an employee trust fund established for the sole and exclusive benefit of the employees of such employer. The Section had been construed to include retirees in *Blassie v. Kroger Co.*, 345 F.2d 58, 70 (8th Cir. 1965). This Court found the Board's Section 302 analysis wanting:

> There is no anomaly in the conclusion that retired workers are "employees" within § 302(c)(5) entitled to the benefits negotiated while they were active employees, but not "employees" whose ongoing benefits are embraced by the bargaining obligation of § 8(a)(5).

*Id.* at 170. In *Pittsburgh Plate Glass*, § 302 was no indication that retirees were "employees" under the NLRA, and in this case LMRA § 302(c)(1) is no indication that Congress intended paid union organizers to be "employees" that an employer was required to consider for hire without regard for that status.

is the Section 7 right to form, join or assist labor organizations or to refrain from doing so. 29 U.S.C. § 157 (1988). Unions and employers have the right to convince employees legitimately that they either should or should not support a union, but neither has the right to make that decision for employees. *Lechmere*, 112 S.Ct. at 849.

Recognizing that employee interests are best served by independent persuasion from labor and management, Congress carefully separated unions and employers from each other and designed the NLRA to keep either from interfering with the independence of the other. There are numerous examples of the independent, and at times adversary, roles that are delineated for employers and unions under the NLRA.

A first principle of the NLRA is that labor and management may not dictate who shall be the collective bargaining agents of the other. *See generally, General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (D.C. Cir. 1969) (discussing fundamental right of both employers and employees to choose their own bargaining representatives). Consistent with this principle, the NLRA prohibits an employer from interfering "with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(2) (1988). An employer violates that section of the Act if its managers and supervisors play a meaningful role in the selection of a union as the employees' bargaining representative. *Machinists v. NLRB*, 311 U.S. 72, 79-80 (1940); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 519-20 (1940). Similarly, the Act prohibits a labor organization from restraining management in the selection of its representatives. 29 U.S.C. § 158(b)(1)(B) (1988). *NLRB v. Electrical Workers*, 481 U.S. 573 (1987); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334-335 (1981).

Further evidence of the independent and distinct roles occupied by employers and unions under the Act is that no union is required to bargain with an employer about the union's rules of membership, 29 U.S.C. § 158(b)(1)

(A) (*proviso*); *Betra Mfg. Co.*, 233 NLRB 1126, 1135 (1977), *enf'd*, 624 F.2d 192 (9th Cir. 1980), *cert. denied sub nom. Thomas v. NLRB*, 450 U.S. 996 (1981); *NLRB v. Corsicana Cotton Mills*, 178 F.2d 344 (5th Cir. 1949), or about how the union runs its affairs. *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 720 (2d Cir. 1961); *Zayre Dep't Stores*, 289 NLRB 1183, 1186 (1988). By the same token, management is not required to bargain with a union about the individuals the employer hires, *Star Tribune*, 295 NLRB 543, 547-48 (1989); *United Technologies Corp.*, 274 NLRB 1069, 1070 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986), or about the employer's basic decisions on how it will run its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *See also Dubuque Packing Co., Inc.*, 303 NLRB No. 66 (1991).

The NLRA has been construed to allow an employer to discharge its managers and supervisors who support union representation. *E.g., Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *review denied sub nom. Auto Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Similarly, a union may expel its members who aid management by working during a strike. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969).

Furthermore, an employer may permit its managers and supervisors to join a union, but it is not required by the Act to do so. *NLRB v. News Syndicate Co.*, 365 U.S. 695, 699 n.2 (1961). By the same token, a union is not required to accept any management representative into it ranks, although it may do so voluntarily. *Id. See also Sakrete of N. Cal., Inc. v. NLRB*, 332 F.2d 902, 908 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

Finally, by way of example, managers or supervisors of an employer may not vote in an NLRB election to determine whether employees will become represented by a union. *See, e.g., Canonie Transportation Co.*, 289 NLRB 299, 300 (1988); *E.I. DuPont de Nemours & Co., Inc.*,

210 NLRB 395, 396-97 (1974). And, the Board generally excludes paid union organizers from voting as well. *See, e.g., 299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988); *Multimatic Products*, 288 NLRB 1279, 1316 (1988).

Given the foregoing examples, it is inconceivable that Congress could have intended that employers would be *required* to hire full-time union organizers. Indeed, it is apparent that the contrary conclusion of the D.C. Circuit in this case is in direct conflict with core principles of the NLRA.

Just last term, this Court reiterated that union organizers could not use the Section 7 rights of the employees they sought to organize to excuse their trespass onto an employer's property. *Lechmere*, 112 S.Ct. at 848. Nonetheless, the D.C. Circuit has concluded that the union can assume the rights of employees by the simple expedient of directing its paid agents to apply for employment with a non-unionized company. But this dispatch of its agents to the employer's work site, employment applications in hand, no more changes the character of the union's rights than if an employer sent its supervisors to apply for a job with a union and thereby attempted to vest them with "employee" status for the purpose of advancing the employer's opposition to unionization from within the union. Neither the union nor the employer should be permitted to gain "employee" status for its paid agents through such stratagems.

Moreover, as the Fourth Circuit recognized in the *Zachry* case, the requirement that an employer accept into its ranks paid union organizers, particularly during a representation campaign, effectively requires the employer to subsidize the organizational activities of the union that, by statute, it may oppose. *Zachry*, 886 F.2d at 75. Indeed, Congress, in Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), sought to maintain the independence of unions for the benefit of employees by prohibiting employers from funding their efforts. As the *Zachry* court observed,

> Because the salary paid such "employees" by the company would partially relieve the union of its obligation to pay its own organizers, this tactic ironically could be construed to compel employers to subsidize labor organizations in violation of section 8(a)(2) . . . It is difficult to imagine a scenario more slanted to one side's advantage.

*Id.* at 75. The D.C. Circuit cursorily dismissed this concern, stating that Section 8(a)(2) was not violated "so long as Willmar gets a day's work for a day's pay out of Hendrix." *Willmar*, 968 F.2d at 1329 n.1. Such an assertion, however, ignores the fact, recognized by the Fourth Circuit, that the employer's payments to the union's professional organizer relieved the union of the burden of paying him without any real loss of his services.[17] In the realm of organizing, most employers and unions are adversaries—competitors for the sympathies of the employees. No competitor should be *required* to subsidize the competition. Yet, the decision of the D.C. Circuit ignores logic and the very fabric of the NLRA by requiring such an untoward result.

In sum, the definitions set forth in the Act and the basic structure of the Act clearly support the conclusion that paid union organizers are not protected "employees." In light of this conclusion, there was no reason for the D.C. Circuit ever to consider the common law meaning of the term "employee." Furthermore, the court's common law analysis can be faulted because the court defined the term "employee" without regard for the NLRA's policies and structure.

The D.C. Circuit began by correctly observing that an individual could be " 'the servant of two masters, not

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[17] In this sense Hendrix is clearly different than the zealous volunteer that the D.C. Circuit perceived as largely "indistinguishable" from the paid organizer. The services of the zealous volunteer would always be available to the union without any monetary outlay. By contrast, Hendrix's presumably professional organizing services were only available for a price.

joint employers, at one time as to one act if the service to one does not involve abandonment of the service to the other.'" *Willmar*, 968 F.2d at 1329-30 *quoting*, Restatement (Second) of Agency § 226 (1958) (other citations omitted). The court then declared that "[u]ntil such time as an employee 'abandons' the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Id.* at 1330. That conclusion ignores the adversarial relationship between employers and unions codified by the NLRA and demonstrated in its underlying policies. As this Court has recognized, the structure of the NLRA demonstrates that unions and employers are essentially "separate factions in warring camps." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947). As such, a paid union organizer's organizing activities on behalf of the union could be construed as nothing less than an "abandonment" of the non-union employer in favor of service to the union. Thus, even under the D.C. Circuit's statement of the common law definition of the term, Hendrix could not reasonably be deemed an "employee" of both Willmar and the IBEW at the same time.

Finally, a determination that a paid union organizer like Michael Hendrix is not an "employee" under the NLRA will not chill the rights of *bona fide* employees to form, join and assist labor organizations.[18] *Bona fide* employees, who have a stake in the employer's enterprise, and who will endure the consequences of whatever union

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[18] Indeed, Hendrix's lack of interest in a true employment relationship with Willmar is apparent. Hendrix was on a leave of absence from *another* employer in order to be a full-time paid union organizer when he applied for a job with Willmar. He took over two weeks to fill out and deliver his employment application to Willmar's foreman, Mr. Rose, and was fully employed as an IBEW organizer when he submitted the application. Finally, prior to applying for a position with Willmar, Hendrix had organized and actively participated in picketing of Willmar's job site in protest of Willmar's allegedly substandard wages.

choice is ultimately made by the employee group, will still enjoy all of the rights afforded them under the NLRA. Unions will still be able to appeal to employees within the broad parameters permitted by the Act. Unions will simply not be able *to require* employers to effectively subsidize this appeal by the forced employment of professional organizers like Hendrix who have no interest in being employed by the employer except as a vehicle to serve the purposes of the union.

In sum, the conclusion of the D.C. Circuit that paid union organizers are "employees" who must be employed by employers without regard to their status as union organizers is inconsistent with the language of the NLRA, and is inconsistent with the policies and purposes which the Act seeks to foster.

## CONCLUSION

For the foregoing reasons, the Chamber and the NAM urge the Court to grant the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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No. 92-687

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITIONER'S REPLY TO BRIEFS OF RESPONDENTS

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## PETITIONER'S REPLY TO BRIEFS OF RESPONDENTS

Petitioner, Willmar Electric Service, Inc., hereby replies to Respondents' Briefs in connection with the petition for writ of certiorari.

At the outset, the Respondent National Labor Relations Board has conceded that the question of whether a professional union organizer is a bona fide employee applicant within the meaning of the NLRA presents an important recurring issue as to which an irreconcilable conflict exists among the circuits. NLRB Brief at 16, 19. The Board, the Petitioner and the *amici curiae* representatives of the business community are therefore in agreement that this case is appropriate for review by the Court and that the Petition should be granted, at least as to the first question presented. The sole purpose of this Reply brief is to address certain factual inaccuracies in the Brief filed by the Intervenors and to demonstrate that review is appropriate as to *each* of the questions presented.

**1. Contrary to the Intervenors' Claim, the Factual Record Squarely Presents the Petitioned-For Issues.**

Interveners have erroneously argued that the petition should be denied because of alleged deficiencies in the record below. Specifically, Intervenors have quoted out of context from portions of Michael Hendrix's testimony at trial in an attempt to show that he would not have been concurrently paid by the union while working for the Petitioner and should therefore not be considered a union employee/agent. Intervenors' Brief at 9.

The Intervenors' attempt to dispute Hendrix's status as an employee of the union was implicitly rejected by the Court of Appeals and did not constitute a basis for the court's decision. Pet. App. A4. In any event, the Intervenors have failed to dispute the controlling fact that Hendrix was employed as the Union's organizing agent *at the time of his application for employment with the Petitioner*, and he gave no indication to the Petitioner that he would cease that employment. It is thus irrelevant what undisclosed arrangements were made between Hendrix and the Union as to his payment or supposed leave status in the event that he had been hired by the Petitioner.

Moreover, contrary to the Intervenors' claims, the record evidence shows that Hendrix had no intention of abandoning his employment with the Union while purporting to work for Petitioner. Rather, when viewed in context, Hendrix's testimony makes it abundantly clear that he intended to retain dual employment with the Union while attempting to organize Petitioner's workforce.

At trial, Hendrix professed merely to be "unsure" about his post-hire compensation arrangements.[1] He was quite clear

[1] Hendrix first stated that he "probably" would cease getting paid by the union, but that he would "still retain the title of organizer." J.A. 34. Later Hendrix admitted that he did not know whether he would continue to be paid

that it was part of his duties as a paid union organizer to seek employment with non-union companies,[2] and that he would continue to act under the direction and control of his union employer while working for Petitioner. Specifically, in the testimony immediately following the passage quoted by Intervenors, Hendrix testified as follows:

> Q: So you're assuming you'd take a leave of absence from employment with IBEW Local 46?
>
> A: I don't know. I have to honestly say I don't know.
>
> Q: You don't know whether you'd continue to be under the direction of — is it Mr. Jordan that you report to?
>
> A: I would always be organizing.
>
> Q: Okay. You would be acting at his direction?
>
> A: I would be acting in my direction.
>
> * * * *
>
> Q: Who gave you employment with IBEW Local 46?
>
> A: Dave Jordan.
>
> Q: So my question was, did you respond, did you continue to respond to Mr. Jordan?
>
> A: I still do.
>
> Q: Okay. He knew you were trying to organize Willmar Electric, among others?
>
> A: Yes, sir. J.A.

J.A. 39A-40.

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by the union, or be compensated for any shortfall in his wages by virtue of having taken a job with Petitioner, because he had not discussed that issue with his union employer. J.A. 38.

[2] Hendrix stated, for example, that it is "normal activity for field organizers to go out in the field. . . . It's understand [sic] that we're seeking employment organizing." J.A. 37.

Thus, the record in this case amply demonstrates both that Hendrix was acting in his capacity as a professional union organizer when he applied for a job with Petitioner and that he would have continued to act under the direction of his union employer if he had been hired.

Based upon these facts, and the record citations in the Petition itself, this case squarely presents the issue of whether a professional union organizer/agent must be treated indistinguishably from a bona fide employee applicant under the Act.[3]

### 2. Contrary to the Intervenors and the NLRB, the Second Requested Issue Has Been Preserved Throughout the Appeal

The Board and Intervenors have both argued that the petition should be denied as to Petitioner's second argument, whether the likelihood of a professional organizer's disloyalty constitutes a defense to a charge of unlawful refusal to hire under Section 8(a)(3). According to Respondents, there is allegedly no proof that Hendrix's likely disloyalty was one of the reasons for his rejection by Petitioner. The Board contends that the record in this case "does not raise any issue concerning whether an employer can justify its refusal to hire an organizer because of his concerns about disloyalty." NLRB Brief at 21. Likewise,

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[3] Intervenors have further erroneously equated Hendrix's status to that of a union sympathizer or "zealot". Int. Brief at 18. As the Fourth Circuit recognized in *H.B. Zachry Co. v. NLRB*, however, an individual employed by a labor union is dependent on and owes a duty of loyalty to that organization, while a mere sympathizer has no such obligation inconsistent with his regular employment duties. *See* 886 F.2d at 73. Furthermore, under the common law of agency, upon which the Court of Appeals relied when interpreting the term "employee" under Section 2(3) of the Act, the right to direct the actions of another is at the heart of the employer-employee relationship and distinguishes employment status from volunteerism. *See* Restatement (Second) of Agency § 226 (relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service).

Intervenors argue that Petitioner failed to challenge in the Court of Appeals the Board's ruling that "its refusal to hire Mr. Hendrix was motivated by union animus under the *Wright Line* test," so that Petitioner is now precluded from challenging that finding in this Court. Intervenors' Brief at 11.

Contrary to Respondents' claims, however, Petitioner conceded nothing at the Board or in the Court of Appeals regarding its motivation for refusing to hire Hendrix. Both in its briefs below and at oral argument, Petitioner specifically argued that it was justified in refusing to take Hendrix's application seriously, among other reasons, *because* his status as a professional union organizer was inimical to loyal service to the company.[4] In this regard, Petitioner argued that the same facts which established Hendrix's employment with the union not only precluded him from being considered to be a bona fide applicant but, as an alternative, provided a proper motivation for Petitioner's refusal to hire Hendrix under Section 8(a)(3).

The Court of Appeals and the Respondents appear to contend that a claim of likely disloyalty could not be relied upon by Petitioner unless the disloyalty was somehow independent of Hendrix's union activities. Pet. at A7; NLRB Brief at 20. In a case where the disloyalty threat arises from a union agent's very employment as a union organizer, however, such a standard makes no sense and would be impossible to meet.

As stated in the petition, the Board itself has recognized that an employer is not required to wait until an actual breach of

[4] In its exceptions and brief to the Board, Petitioner appealed the ALJ's finding that its refusal to hire Hendrix because his application was made pursuant to his full-time union employment responsibilities was "an admission of improper motive" and that its failure to consider Hendrix's application seriously "constituted a violation of the NLRA." Willmar's Exceptions to the ALJ's Decision at 4. Petitioner reiterated these exceptions in its briefs to the Court of Appeals. *See* Brief of Petitioner at 26; Reply Brief of Petitioner at 10 n.9; *see also* J.A. 19-20, 145-147, 167, 198.

loyalty occurs to take protective action, where an employee is in a conflict situation. *See, e.g., Raytheon Co.*, 279 NLRB 245, 249 n.11 (1986) (conflicts of interest are by their nature anticipatory or potential). The Board decisions cited in the petition, Pet. at 16-18, stand for the principle that it is not a violation of the Act to take an unfavorable employment action against an employee, where an employer has a good faith belief that the employee will act in derogation of his duty of loyalty to the employer.[5] Consequently, because there is ample evidence in the record to demonstrate Petitioner's good faith belief that Hendrix had such a conflict of interest, the second question presented for review is also supported by the record.

### 3. Respondents' Arguments Misstate National Labor Policy

The Respondents' arguments are premised upon a failure to acknowledge that, as a matter of national labor policy, employers and professional union organizers have an inherent adversity of interest. NLRB Brief at 14-15; Intervenors' Brief at 14-20. As more fully set forth in the petition and by *amici curiae*, Respondents' assertions completely ignore the plain language and underlying structure of the Act, and the previous decisions of this Court, which clearly recognize the competing interests of employers and unions. Indeed, it is the D.C. Circuit's failure to properly take into account the adversarial

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[5] This principle has recently been confirmed by the Board's decision in *Sunland Construction Co., Inc.*, 309 NLRB No. 180 (Dec. 16, 1992), in which the Board held that an employer may lawfully refuse to consider the application of a paid union organizer who seeks employment and, at the same time, leads a strike against the employer. The Board recognized that the employer had a "substantial and legitimate business justification" for declining to hire the union agent. *Id.* at 17. It is significant to point out in this context that, concurrent with his efforts to obtain employment with Petitioner, Hendrix also led picketing activity against it. J.A. 7-9, 42-47, 278A-C. Indeed, Petitioner's project foreman told Hendrix that "its kind of hard to hire you when you're out there on the other side, picketing." J.A. 19-20.

relationships codified in the Act which requires the reversal of its decision.

As set forth in the petition, this Court has held that the NLRA treats unions and management as "separate factions in warring camps."*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 278 (1974), *quoting Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting). *See also Carpenters' Union v. NLRB*, 357 U.S. 93 99-100 (1958) (NLRA strikes a balance between the "uncontrolled power of management and labor to further their respective interests"). The Act codifies this adversary relationship in numerous ways, which are designed to prevent either side from interfering with the independence of the other. *See* 29 U.S.C. §§ 152(2) and 152(3) (excluding from definition of "employee" any person employed by a labor organization not acting as an employer); 29 U.S.C. § 158 (a) (2) (prohibiting employer assistance to labor organizations); and *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992); *see also Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *enf'd* 711 F.2d 383 (D.C. Cir. 1983) (permitting employers to discharge supervisors who support union representation); *Scofield v. NLRB*, 394 U.S. 423 (1969) (permitting union to expel members who aid management by working during a strike). The arguments of the Respondents and of the Court of Appeals obliterate the distinction between union professional agents and bona fide employees and, if adopted, will unfairly tilt the balance of power in the organizing process.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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